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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO.,
AND ALFA-LAVAL CREDIT AB,
Petitioners,
v.
BRITZ, INC., HELM CONCENTRATES, INC.
AND HELM TOMATOES, INC.,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 6, 1991

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Re: American Arbitration Association
Case No. 72-199-2101-90
Helm Concentrates, et al. v. Alfa-Laval, et al.

Gentlemen:

I have Mr. Savrnoch's December 2, 1991 letter requesting issuance of a deposition subpena for the production of documents by L & A Engineering. Mr. Strauss responded by letter dated December 5, 1991, to which he attached a copy of L & A Engineering's Opposition to Motion to Compel, heard by the Superior Court on November 27,

1991. I have read and considered these writings and have researched and analyzed Mr. Strauss' point that discovery is not available to parties in arbitration unless it has been agreed.

California Code of Civil Procedure Section 1283.1(b) states:

> Only if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made part of or made applicable to, any other arbitration agreement.

Section 1283.05 governs the taking of depositions and discovery in arbitration proceedings.

Although the arbitration provisions of the contracts at issue in this arbitration do not specifically incorporate Section 1283.05, this arbitration has proceeded for some months during which a substantial amount of discovery has occurred, apparently by agreement of the parties. Thus, the arbitrator will issue the deposition subpena as requested by Alfa-Laval, and invites counsel's attention to CCP Section 1282.6. The arbitrator will be available for signature of the filled-in subpena.

Very truly yours,

/s/ JOHN E. PETERSON
John E. Peterson

JEP/rs

cc: Mr. Ron McNair
Case Administrator

[LETTERHEAD]

December 2, 1991

John E. Peterson, Esq.
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P.O. Box 5394
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Re: *AAA — Case No. 72-199-2101-90: Helm Concentrates, et al., v. Alfa-Laval, et al.*

Dear Mr. Peterson:

As the assigned AAA arbitrator in the above-referenced case, this letter is to serve as a request for the issuance of deposition subpoenas. Alfa-Laval seeks to discover what it believes to be highly relevant information from a non-party and seeks to have the deposition subpoenas issued under your authority as arbitrator in this matter.

Alfa-Laval seeks to discover certain technical drawings from L&A Engineering, a contractor involved in the design and installation of certain "upstream" equipment at the Helm plant. The documents sought to be discovered were previously the subject of a Motion to Compel in Fresno County Superior Court which was heard on November 27, 1991. The Motion to Compel was denied by the court due to the fact that the Superior Court action has been stayed pending arbitration.

L&A Engineering, Inc. fabricated, or installed, the majority of the equipment within plaintiff's tomato processing facility. It is critical for defendants' defense in the arbitration proceeding to determine how the facility was designed and operated in total because plaintiffs' damages allegedly resulted from the design and operation of Alfa-Laval equipment within plaintiffs' tomato processing facility.

On or about September 13, 1991, Alfa-Laval caused to be served on L&A Engineering a subpoena for the production of documents. On September 25, 1991, Thomas J. Verticchio, one of the attorneys for Alfa-Laval, had a telephone conference with Mr. Alan Strauss, one of the attorneys for L&A Engineering, in which it was agreed between Mr. Verticchio and Mr. Strauss that because of L&A's objections to the scope of the subpoena, L&A would be relieved of its obligation to respond to the subpoena at that time.

It was agreed that L&A Engineering would allow Mr. Verticchio to inspect L&A's documents at L&A's offices on or about October 11, 1991. On October 11, 1991, Mr. Verticchio met with Mr. Strauss and Mr. Frank Byrom, president of L&A Engineering, at L&A's offices for the inspection of documents.

Mr. Strauss and Mr. Byrom advised Mr. Verticchio that certain documents would not be produced for inspection or duplication as it was the position of L&A, and its counsel, that those documents were proprietary in nature.

Attorneys and consulting experts of Alfa-Laval have analyzed the documents that were produced by L&A and believe the information they require from L&A in order to defend this arbitration is not contained in those documents but rather is contained in the documents which L&A has refused to produce.

Among documents which were produced for inspection and duplication by L&A were documents which purported to be the complete correspondence file between L&A Engineering and Helm Concentrates, Inc., Helm Tomatoes, Inc. and Britz, Inc. for the relevant time period. However, attorneys for Alfa-Laval have since discovered through document subpoenas served on other non-parties that correspondence between L&A Engineering and Helm Concentrates, Inc., Helm Tomatoes, Inc. and Britz, Inc. has not been produced. Because certain correspondence contained in L&A's files have not been produced, it is appropriate that the complete file of L&A's correspondence come within the scope of the subpoena.

Retained experts for Alfa-Laval have indicated that it is necessary to further analyze documents that L&A Engineering did not produce. The necessity is based upon the fact that the performance of "upstream" equipment would greatly affect the performance of the entire facility and more particularly the equipment installed by Alfa-Laval.

By this letter, the attorneys for Alfa-Laval respectfully request that a records only deposition subpoena be served upon L&A Engineering, Inc. for the following documents:

a. All as-built drawings, blueprints, and/or final shop drawings for all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

b. All documents, drawings, blueprints, and/or shop drawings setting for the temperature profiles and/or product flow profiles for any and all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

c. All documents, drawings, blueprints, and/or shop drawings depicting the specifications and/or dimensions of any and all equipment, including tanks, installed by L&A Engineering, Inc. and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

d. All other documents, drawings, blueprints, and/or shop drawings depicting the design and/or operation of any and all equipment installed by L&A Engineering and/or Dennis Design at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

e. All timesheets and/or job records indicating the days and/or times employees or agents of L&A Engineering performed work at the HELM TOMATOES, INC. processing facility in Helm, California, during calendar year 1990.

f. All correspondence between L&A engineering and HELM CONCENTRATES, INC., HELM TOMATOES, INC., and BRITZ, INC. referring or relating to work done by L&A Engineering for those entities between January 1, 1989 to the present.

A copy of this request for deposition subpoena is also being forwarded to Mr. Ted Frame, attorney for Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc.

As the arbitration date is scheduled for January 6, 1992, we respectfully request that action be taken on this request as soon as feasible. Thank you for your consideration of this matter.

Very truly yours,

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH

/s/ JOHN T. SAVRNOCH
John T. Savrnoch

JTS/cp

cc: Ted Frame
Craig White

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John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of: ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB, *Petitioners,* and HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC., *Respondents.*	American Arbitration Association Case No. 72199 2101 90 AWARD OF ARBITRATOR

I
INTRODUCTION

Hearing was held in this case at the Marriott Courtyard, 140 East Shaw Avenue, Fresno, California beginning on January 6, 1992, at 9:00 a.m. before John E. Peterson, Esq.,

arbitrator, and Cindy Pickens-Jensen, certified shorthand reporter. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., and Alfa-Laval Credit AB (hereinafter "Alfa") appeared by Wildman, Harrold, Allen & Dixon, by Craig M. White, Michael Dockterman and Thomas J. Verticchio; and Helm Concentrates, Inc., Britz, Inc., and Helm Tomatoes, Inc. (hereinafter "Helm") appeared by Frame & Matsumoto, by Ted R. Frame.

Arbitration was held pursuant to the Rules of Commercial Arbitration of the American Arbitration Association under arbitration provisions contained in three contracts by which certain tomato processing equipment was provided by Alfa to Helm in the Spring and Summer of 1990.

Alfa initiated this arbitration by petition alleging that Helm breached three equipment contracts by failing to pay the amounts due to Alfa after Alfa had delivered and installed the equipment in a tomato processing plant owned by Helm. Helm's counter-claim alleges that Alfa was guilty of various forms of misrepresentation and breach of warranties. Each party raised affirmative defenses to the other's allegations.

The parties agreed that the arbitration would be bifurcated so that after the initial hearing, the arbitrator would decide upon issues of liability, leaving proof of damages for a subsequent hearing.

The arbitrator has considered post-hearing briefs submitted by both sides, the oral testimony provided by witnesses called during the hearing, exhibits proposed and admitted during the course of the hearing, and makes the following findings of fact and conclusions of law as to the respective liabilities of the parties.

II

FACTUAL BACKGROUND

Alfa is a multi-national corporation headquartered in Sweden with offices in United States. It is engaged primarily in the manufacture and sale of various types of food processing equipment, with varied application.

Helm Concentrates, Inc. is a California corporation organized to construct and own a tomato processing facility on real property owned by Britz, Inc. Helm Tomatoes, Inc. is a California corporation organized for the purpose of leasing the tomato processing facility from Helm Concentrates, Inc. and operating it to process tomatoes.

The Helm tomato processing facility was built and equipped in furtherance of a Tomato Products Packing Agreement with Borden, Inc. assigned to Helm Tomatoes, Inc. in September 1989. The minimum term of the Agreement was seven years, and required Helm to provide annual quantities of tomato products meeting Borden's quality standards. The Helm/Borden Agreement required a minimum of 17 million pounds of tomato paste, 12 million pounds of diced tomatoes and 2 million pounds of crushed tomatoes. The Agreement required Borden to provide six months' notice of the amounts of these tomato products Borden required from the tomato crop grown following the notice.

Late in the Summer of 1989, Helm representatives began the task of building and equipping a tomato processing facility which was to begin operation in time to accept tomatoes harvested in June, July and August 1990. Robert Glassman and Claude Luster, without the services of an architect or a general contractor, shared the responsibilities for the construction of the Helm facility and the purchase of the equipment to be installed in it. Glassman and Luster intended to rely on design-build services provided by the

vendors of the building and equipment. Glassman was responsible for legal, regulatory and financial issues, and Luster was responsible for selecting equipment for the facility and for some of the subcontracting.

Helm Concentrates purchased tomato processing equipment from L&A Engineering and Equipment, Inc. ("L&A"), FMC Corporation ("FMC") and Alfa. These contracts were signed in October and November 1989. The L&A and FMC equipment was installed "upstream" from the Alfa equipment, so that tomatoes processed by the Alfa equipment had first to pass through the L&A and FMC equipment.

On November 20, 1989, Luster signed the Helm Concentrates/Alfa-Laval Agreement by which Helm purchased for approximately $1,426,000 an aseptic processing system for tomato paste and tomato crush. The system for rendering tomato paste commercially sterile utilized scraped surface heat exchangers known as Contherm units, arranged in two lines. The system for rendering tomato crush commercially sterile utilized a tubular heat exchanger known as Spiratech, arranged in one line.

On December 8, 1989, Helm entered into an agreement for the purchase of sterile packages from Alfa, and on the same date, entered into a lease agreement with Alfa for the rental of three StarAsept filling machines. Two of the filling machines were to be used on the crush line, and one on the paste system. It is Alfa's performance of these three agreements that form the subject matter of this arbitration.

The Helm tomato processing facility included three buildings — a processing building, a utility building and a warehouse. All three buildings are structural steel construction on concrete foundations. The process building was totally enclosed in April 1990; the warehouse in early May 1990; and the utility building in July 1990.

Installation of the Alfa equipment began on April 18, 1990. The installation of the paste system was completed on June 15, 1990, and the installation of the crush system was completed on June 26, 1990.

Paste production began on July 8, 1990, crushed tomato production on July 22, 1990, and diced tomato production on July 25, 1990.

Production continued until September 2, 1990. The Alfa paste system was not operated after August 30, 1990.

During production, problems arose with the production equipment, including that of L&A and Alfa. Delays occurred in the processing of tomatoes delivered to the plant. Many of the growers who had contracted to deliver tomatoes to the plant were told not to do so. Helm and Alfa disagree as to the cause of the problems. In any event, on November 9, 1990, Borden canceled the Tomato Products Packing Agreement for failure to supply the minimum annual quantity of products to Borden during the 1990 fiscal year.

In December 1990, Helm wound down its operations, and terminated operations and all employees on January 4, 1991. Helm sold substantially all of the assets of the tomato processing facility to Hunt-Wesson, Inc. by written agreement dated February 5, 1991. The Alfa equipment and bags were excluded from the sale to Hunt-Wesson. In March, 1991, Alfa and Helm reached an agreement whereby Alfa attained possession of the equipment and the bags for the purpose of reselling them.

On October 10, 1990, Alfa demanded arbitration against Helm, seeking an award of money damages, interest, costs and attorney fees. In response, Helm denied all Alfa's allegations an filed a counter-claim and amended counter-claim seeking rescission of the three contracts, and money damages in excess of $42 million. Alfa has denied all of the

allegations of Helm's amended counter-claim and has interposed affirmative defenses which will be discussed below.

III

THE MISREPRESENTATION CLAIMS

The Helm Respondents seek rescission of the three Alfa agreements, return of money already paid as purchase price and rent, and consequential damages based on Alfa's alleged intentional and negligent misrepresentation and non-disclosure of known facts. Helm's post hearing briefs focused on the negligent misrepresentation theory as the basis for rescission and damages, and appeared to abandon the theories of intentional misrepresentation and non-disclosure of material facts. In any event, the arbitrator finds that Alfa made no intentional misrepresentations, and did not fail to disclose material facts in connection with the three agreements which form the subject matter of this arbitration. This portion of the award will address the negligent misrepresentation theory proposed by Helm.

Helm's primary claim is based on alleged negligent misrepresentations which induced the execution of the three contracts. Specifically, Helm alleged that Alfa represented that the Aseptic tomato paste lines could be "cleaned in place" in two to three hours, and that the Contherm units in the Aseptic paste lines would have continuous run times of 10 to 12 days. Helm's position is that these representations were made by Alfa representatives during negotiation of the equipment contract (Helm Exhibit 37) and that these representations were false. Helm further alleges that it reasonably relied on these representations in the execution of the equipment contract.

During negotiation of the equipment contract, Helm's overriding concerns were to build the facility in time to meet the production requirements of the Borden Contract, and to

build a facility which could be used to process other foods. The Borden Contract imposed severe time pressures on Helm.

For its part, Alfa was keenly interested in entering the market of providing its equipment to the California tomato processing industry. As of the time during which the equipment contract was being negotiated, Alfa had not provided Contherm units for use in sterilizing California tomato paste.

Claude Luster, well trained and experienced in the tomato processing business, was very familiar with the uniqueness and flow characteristics of California tomato paste. He testified that he provided that information to Alfa during the negotiation of the equipment contract. He also knew from his experience that Alfa had no Contherm units sterilizing California tomato paste. Also, as a person experienced in plant start-up in the food processing industry, Mr. Luster must have known that firms like Alfa, which combine design and engineering services with product manufacture, are constantly faced with new and different applications of their equipment. Each builder of a food processing plant has its own peculiar problems and products, and part of the service Alfa provides is to solve one-time sets of proposed applications of its equipment.

Mr. Luster testified about communications he had with Evan Klintner about processing California tomato paste and Alfa's experience in that area. Part of that testimony follows (RT. 288:4-19):

> And so we characterized the produce to him as being a very viscous product, and he indicated that he saw no problem with that. We asked him regarding the experience of Alfa-Laval in terms of tomato processing. He indicated that a lot of Alfa-Laval's projects were confidential and he couldn't get into the exact nature of where

they were or what particular products they were working with, but he did indicate that they had a facility in Italy; they had a facility in Australia, I think. And they had facilities around the world that he could not designate as to what they were doing and why they — and how they were doing it, but basically indicated that he didn't see the particular product that we were working with as a challenge.

This testimony best capsulizes the nature of the communication between Alfa and Helm that led up to the signing of the equipment contract by the parties. No facts were misrepresented in this conversation. The arbitrator finds that there were no material facts misrepresented by Alfa to Helm during negotiation. Both Helm and Alfa were fully familiar with the problems involved in building, starting up and operating a tomato processing facility as contemplated by Helm.

Helm urges strenuously that Alfa misrepresented its equipment as permitting clean in place in a two to three-hour time frame, and as permitting continuous runs of 10 to 12 days. Although it is clear that Alfa made such communication to Helm during the negotiation, it is also clear that that communication is not of a material fact. Rather, it is a promise by Alfa to Helm to provide paste sterilizing equipment that would meet these time parameters. This promise found its way into the equipment contract at paragraph 1.1, entitled "General," as follows:

> The most common mode of operation is continuous, with stops only for breakdown repair. The approach taken in this proposal allows for such a mode of operation, although it is not our recommended plant operation plan. Planned shut-downs with minor maintenance will save the equipment, increase plan utilization and give an overall more economic operation. The design presented here allows for both modes of operation. We recommend one

shut-down and CIP including inspection of wear parts once every 10-12 days. A shut-down would last 2-3 hours.

In California, the general rule is that, in the absence of an intent not to perform, the mere making of a promise which the promisor fails or refuses to perform does not constitute actionable fraud, since a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform does not change its character. *Reingans v. Smith* (1911) 161 Cal. 362, 119 Pac. 494. Failure to make good a promise is merely a breach of contract which may be a ground for an action for damages. See 34 *Cal.Jur. III* (3rd ed. 1977) Fraud and Deceit, §20, and cases cited at footnotes 71 and 72. The arbitrator finds that both Helm and Alfa knew that Contherms had not been used to process California tomato paste, but that Alfa reasonably believed that the Contherm units could achieve 10 to 12 days continuous running time, with 2 to 3-hour shut-downs.

Prior to negotiation of the equipment contract, Alfa had provided Contherms for use on extremely viscous products, and had provided Contherms for use in Italian and Australian tomato paste processing. These applications, combined with its history of past successes in engineering applications could reasonably provide the basis for the promise made in the equipment contract concerning run times and shut-down times.

A different conclusion is not indicated by any of the cases cited by Helm in its post-trial briefs, nor revealed by independent legal research by the arbitrator. The court in *Continental Airlines v. McDonnel Douglas Corp.* (1989) 216 Cal.App.3d 422, 264 Cal.Rptr. 779, in ruling that the trial court did not prejudicially err in admitting parol evidence under the fraud exception to the Parol Evidence Rule, distinguished between promissory language (inadmissable under the fraud exception to the Parol Evidence Rule) and factual representation (admissable under the fraud excep-

tion to the Parol Evidence Rule). In *Continental Airlines,* the contract negotiated by the parties by which Continental acquired its fleet of DC-10 aircraft contained a specification which stated, in part "the failure mode is *not likely* to rupture the integral wing fuel tank or fuel lines."

In a pre-contract brochure, McDonnell Douglas made this promise for the DC-10: "The fuel tank *will not rupture* under crash load conditions." Since this promissory language was inconsistent with the language of the contract, the court held that admission of that brochure was error.

In contrast, other brochures made *factual* representations and were held admissible under the fraud exception to the Parol Evidence Rule. Examples of these admissible *factual* representations are (*Continental Airlines,* 216 Cal.App.3d 422, 264 Cal.Rptr. at 798, *supra*):

> The structure is designed and tested for crashworthiness. The landing gear, flaps and wing engines/pylons *are designed* for wipe-off without rupturing the wing fuel tank or fuselage shell structure.
>
> and
>
> These multiple load paths [on the wing] *are designed* to provide strength greater than that of the gear itself in order to prevent rupture of the fuel tank in the event of impact with some obstacle during the landing and taxiing,
>
> and
>
> Under crashloading conditions, the main landing gear *is designed* to break away from the wing structure without rupturing fuel lines or the integral wing fuel tank.
>
> and

> The [wing] support structure *is designed* to a higher strength than the gear to prevent fuel tank rupture due to an accidental landing gear overload. (Emphasis added.)

The court held that these four representations from the pre-contract brochures, which unequivocally announced that the landing gear breakaway design was then a *fait accompli*, were admissible as *factual* representations by Douglas to Continental that it had already accomplished its safety-oriented design for that particular feature of the aircraft. *Continental Airlines, supra*, 216 Cal.App.3d at 423, 264 Cal.Rptr. at 798.

There was no evidence provided in this arbitration to the effect that Alfa represented to Helm that Alfa had run California tomato paste through Contherm units and had observed that these units would permit 10 to 12 days continuous running, with 2 to 3-hour shut-downs or that the Contherm units were so designed. Rather, it was clear to Helm, from the testimony and the documents, that Alfa had no experience in the processing of California tomato paste and was interested in beginning to provide its equipment to that market.

Another species of fraud in California is making a promise without any intention of performing it. On analysis, this amounts to a misrepresentation of an existing fact, that is, the fact of the state of mind of the promisor. In this arbitration, it affirmatively appears that Alfa had every intention of providing aseptic paste lines which would run continuously for 10 to 12 days, with 2 to 3-hour shut-downs.

To make a long story short, Alfa made no misrepresentation of a material *fact*. Alfa made contractual commitments to Helm based on its past successes and its perhaps optimistic assessments of the capabilities of its Contherm units.

IV

CONTRACT CLAIMS

Alfa committed to provide a tomato paste processing system to Helm which would produce aseptic tomato paste at the rate of 25,366 pounds per hour. The system was to be capable of continuous runs of 10 to 12 days, interrupted by two to three hour shut-downs. Alfa and Helm understood that this system was to operate consistently over a 75 to 90 day tomato processing season.

According Helm's tomato packing tally sheets (Alfa Exhibit 179) production began on July 8 on the Alfa paste line and concluded on August 30. In that time, there occurred a number of shut-downs during which the Alfa paste lines were cleaned in place. Manual cleaning was necessary because of the presence of tomato fibers and caramelized "burn-on" in the heating Contherms. It does not appear that any of these shut-downs approached the two to three hour time limit set forth in paragraph 1.1 of Exhibit 1 to the equipment contract. For the most part these shut-downs were of a 10 to 12-hour duration. It was necessary for Helm to clean the units by hand, change seals by hand, inspect wear parts and manually connect and disconnect the paste lines to and from the hot divert system.

During the July 8 to August 30 time frame, there were two occasions during which the Alfa paste line achieved the 10 to 12-day continuous run. The parties dispute whether these runs should be considered effective. Helm argues that they should not, because septicity problems arose during these runs. Helm's expert, John Westcott, testified that one could expect only 3 to 4-day run time's from Contherm units under all circumstances.

Helm's tally sheets for the Alfa paste lines show that there were a number of hours during the processing of aseptic paste during which the contract rate of

25,366 pounds per hour was met. However, on average over the July 8 to August 30 time frame, the rate was 60 to 80 percent of the contract rate.

The equipment contract sets forth a number of performance guarantees in Section 8. Subsection 8.1 sets forth the terms of the aseptic warranty; subsection 8.2 sets forth the warranty with respect to capacity; and Section 8.3 requires Helm to perform certain conditions precedent to the effectiveness of the aseptic warranty and the warranty with respect to capacity. Alfa's promises regarding run time and shut-down time are not specifically addressed in the equipment contract. However, Section 3 of the plant completion procedure (Exhibit 5 to the equipment contract) sets forth general procedures governing the circumstances in which Alfa has specified guaranteed criteria for the performance of the plant determinable by performance tests. This section appears to permit Alfa 9 months to remedy any failures of performance related to run time and duration of shut-down.

Pursuant to the provisions of Subsection 8.1 of the equipment contract, samples of processed paste were provided to the National Food Laboratory. The samples were taken from production of paste from July 13 through July 16, and delivered to the National Food Laboratory on July 18. On July 31, by letter, the National Food Laboratory advised Alfa that no lactic acid bacteria were detected in the product at the dilutions tested. This testing satisfies the aseptic warranty in subsection 8.1 of the equipment contract.

The procedures for capacity tests set forth in subsection 8.2 regarding the warranty with respect to capacity were not followed by the parties during the operation of the Alfa paste lines. Likewise, no performance tests were done with respect to the continuous run time provision or shut-down duration. It is clear that the omission of these testing procedures resulted from the extreme time pressures under

which both Helm and Alfa operated during the telescoped 1990 processing season at the Helm facility.

It is the arbitrator's conclusion that the tomato production losses at the Helm facility in 1990 resulted from mechanical failures and breakdowns which might or might not be related to the Alfa equipment for the reasons set out below. This conclusion relates to and covers Alfa's contractual obligation to provide aseptic paste at 25,366 pounds per hour, but not to its obligation to provide 10 to 12-day run times interrupted by a 2 to 3-hour shut-downs for CIP.

Alfa personnel in various numbers were present at the Helm facility continuously during the plant operation in the summer of 1990. The arbitrator concludes that the Alfa representatives made good faith efforts to adjust and improve the operation of the Alfa equipment. Alfa personnel were barred from the Helm facility on and after September 18, 1990, four days after Helm filed in Fresno County Superior Court Action against Alfa setting forth the allegations that are now the subject of this arbitration.

Helm points to actual paste production figures which are on average well below the promised aseptic paste production rate of 25,366 pounds per hour. However, the arbitrator credits the testimony of Messrs. Lowen and Madeiros as to the limited capacity of the upstream equipment provided by L&A Engineering. This limited capacity of the upstream equipment makes it virtually impossible to draw accurate conclusions as to whether the Alfa paste lines could consistently produce aseptic paste at the rate of 25,366 pounds per hour. The upstream equipment limit factor is further complicated by Helm's refusal to provide Alfa sufficient time within which to provide appropriate repairs or redesign of the paste lines. Finally, the questionable state of the utilities provided by Helm, although not a determinative factor, cuts against Helm sustaining its burden of proof on its contract claims regarding capacity.

Helm produced evidence to the effect that there were sterility problems at times during paste production by the Alfa Contherms. Helm specifies July 22 through July 26 and August 11 through August 21. However, Ms. Naito, Helm's laboratory technician, testified that she did not determine the cause of the July spoilage, and she laid the August sterility problem to the filler.

Many of the bins which Helm believed might be septic were shipped to cold storage. Approximately 1,500 of these bins were later sold on the open market. In any event, the failure to give Alfa adequate time, the capacity and mechanical problems with the upstream equipment and the failure of Helm to provide adequate utilities render accurate assessment of these sterility problems too difficult to warrant a conclusion that Helm has carried its burden of proof on its breach of contract claim regarding capacity. In essence, the arbitrator finds in favor of Alfa on its defense that Helm failed to perform its part of the equipment contract, as set forth in subsection 8.3.

With respect to Alfa's obligation to provide aseptic paste processing equipment which would maintain 10 to 12-day run times interrupted by 2 to 3-hour shut-downs CIP and maintenance, the arbitrator concludes that the Alfa equipment failed, and that no amount of additional time or effort would have enabled the equipment to operate in accordance with Alfa's commitment. However, under all of the circumstances of this case, the arbitrator concludes that this obligation did not go to the heart of the contract, and can be compensated by money damages as a credit as to amounts due Alfa from Helm on account of delivery and installation of the Alfa equipment. Further, the arbitrator concludes that the problems with the upstream equipment and the problems with the utilities had some effect on the run time/shut-down time commitments but not substantial enough to excuse Alfa from these commitments.

California "case law has uniformly held that a failure of consideration must be 'material,' or go to the 'essence' of the contract before rescission is appropriate." *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 404, 149 Cal.Rptr. 626, 633. Partial failure of consideration may not discharge the other party's obligation under the contract. As noted in 1 Witkin, Summary of California Law (9th ed. 1987) *Contracts*, §758 "the court will consider such factors as extent of performance or preparation and good faith of the defaulting party, the hardship on him of a termination of the contract, the adequacy of damages to compensate the other party for the default, etc. (See Rest. 2d Contracts Section 241; 3A Corbin Section 704 et seq.; 1 Williston 3rd Section 842 et seq.; 21 A.L.R. 2d 1247 . . .)."

Under all of the circumstances of this case, the arbitrator finds the failure of the Alfa equipment to provide 10 to 12-day run times interrupted by 2 to 3-hour shut-downs is a partial failure of consideration which can be adequately compensated by damages as a credit on the amounts due Alfa on account of the installation and delivery of the Alfa paste processing equipment.

V

CONCLUSION

This interim award is hereby entered in favor of Alfa, on each of (1) the equipment contract of November 20, 1989; (2) the bag contract of December 8, 1989; (3) and the filler lease of December 8, 1989. Alfa is entitled to money damages and interest. Each side will bear its own costs and attorney fees.

Helm is entitled to a credit based on the repossession and disposition by Alfa of the equipment, StarAsept filler and bags, and a credit based on the reduced value of the equipment on account of its inability to meet the 10 to

12-day run time duration and 2 to 3-hour shut-down time. This award is entered against Helm Concentrates, Inc., the primary obligor under these three contracts, and against Britz, Inc., the guarantor.

Having found that Helm had no right to rescind the three contracts, the Arbitrator finds it unnecessary to reach Alfa's affirmative defenses of ratification, delay in rescission, Helm's bad faith conduct, and accord and satisfaction.

The Arbitrator commends the attorneys for both sides on their consistently excellent presentations and on their maintenance of a collegial atmosphere throughout the arbitration process.

DATED: May 22, 1992.

/s/ JOHN E. PETERSON
John E. Peterson, Arbitrator

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755

Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of: ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB, *Petitioners,* and HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC., *Respondents.*	American Arbitration Association Case No. 72199 2101 90 ORDER RE MOTION FOR RECONSIDERATION OF INTERIM AWARD

I

INTRODUCTION

Following entry and service of the interim award of Arbitrator in this case, Respondents Helm Concentrates, Inc., Britz, Inc., and Helm Tomatoes, Inc. (hereinafter

"Helm") moved for reconsideration of the interim award. Petitioners Alfa-Laval Food and Dairy Co. and Alfa-Laval Credit AB (hereinafter "Alfa") responded. Having considered the points and authorities provided by Helm in support of its motion, Petitioner's memorandum in response and Helm's closing memorandum, the Arbitrator has re-examined his award dated May 22, 1992, in its entirety, and supplements that interim award as follows.

II

FACTUAL BACKGROUND

To the extent that the Arbitrator finds additional material facts, those facts will be set forth more particularly in the following sections.

III

THE MISREPRESENTATION CLAIMS

A. *Promises v. Representations*

The Helm Respondents insist that Alfa's communication about the cleaning time and continuous run time of its Contherm processing lines were misrepresentations rather than promises or predictions as to those facets of the processing lines. They pluck the phrase "the design presented here" from Section 1.1 of the project description in the Alfa-Helm Agreement as evidence supporting this conclusion.

In fact, that phrase appears in the sentence "The design presented here allows for both modes of operation." Those modes of operations were described earlier in Section 1.1 of the project description as continuous running with stops only for breakdown and repair, or planned shut-downs with minor maintenance. There was no evidence from which the Arbi-

trator could conclude that "the design presented here" would not in fact allow for both modes of operation.

In *Continental Airlines v. McDonnell-Douglas Corp.* (1989) 216 Cal.App.3d 422, 264 Cal.Rptr. 779, the language ruled to be that of representation rather than promise specified already existing design. In this case, the language "we will recommend one shut-down and CIP including change of minor wear parts once every 10-12 days. A shut-down would last 2-3 hours" implies that the system will meet those time parameters. The quoted language does not represent that those time parameters have been designed into the system or actually met in past applications.

In Helm's closing memorandum, the Arbitrator's attention is invited to 15 statements from the Alfa-Helm Agreement noting aspects of the system designed by Alfa to be already designed. Each of these 15 citations tends to support the interpretation of the time parameters language as that of promise, because in each of these 15 instances there is a much greater degree of specificity as to exactly what the system and its various parts will do.

In the overall context of the Alfa-Helm Agreement, and of all of the testimony presented as to the CIP shut-down and run times, the Arbitrator concludes that the language at issue was that of promise and not a representation of existing fact. In any event, as has already been noted, whether this was representation of existing fact or promise of future performance, the CIP shut-down and run times language is not essential to the purpose of the Alfa-Helm Agreement. It is simply one aspect of the overall promise by Alfa to provide a system which would produce aseptic tomato paste at a rate of 25,366 pounds per hour over the expected duration of the tomato processing season of 75 to 90 days. If the latter production capability is met, it simply does not matter whether or how many shut-downs occur for CIP.

B. *Inherent Capabilities*

Helm has cited three United States Court of Appeals cases in support of the theory that Alfa's statements about run times and shut-down times were statements of the inherent capabilities of its equipment, and were representations, not merely promises or predictions of future performance. These cases are inapposite. In *Clements Auto Co. v. Service Bureau Corp.* (8th Cir. 1971) 444 F.2d 169, a panel of the United States Court of Appeals for the Eighth Circuit interpreted Minnesota law, which permits a cause of action based on innocent misrepresentation. There is no comparable cause of action in California.

The court in *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.* (6th Cir. 1982) 687 F.2d 877, cited *Clements Auto Co.* for the proposition that:

> General representations that data processing equipment will be suitable for a customer's operations, based upon familiarity with both the equipment's capabilities and the customer's needs, are statements concerning present facts.

However, this comment was made in a factual context in which a relationship of trust and confidence was found to have existed between a representative of Honeywell and a representative of plaintiff, and in a situation in which there was testimony that a Honeywell engineering employee had recommended to the Honeywell salesman against the Honeywell system that was sold to plaintiff. In addition, Honeywell had promised to convert all of plaintiff's programs, knowing that it had no intent to do so.

In our case, Claude Luster and the Alfa representatives knew that there had been no tomato processing plant handling California tomato paste by the use of Contherm units in the numbers and configurations set forth in the Alfa-Helm Agreement. In the overall context of the negotiations

and the Alfa-Helm Agreement, the representations regarding continuous run time and shut-down time were representations of prediction or of promise rather than of existing fact.

Helm cites *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 Fed.2d 658 as similar in effect to *Clements Auto* and *Dunn Appraisal*, in applying California law. However, in *Glovatorium*, NCR Corp. had sold a computer system with actual knowledge of its defects, and covered up those defects. No such facts appear in our case.

In addition, in *Glovatorium*, the court expressed the proposition that "fraud is properly inferred from the immediate failure to perform a promise." 684 F.2d at 681. In our case, although the tomato paste processing system did not ultimately reach the promised continuous run time or CIP shut-down time, the system was approaching the promised times, until Helm prematurely barred Alfa from the processing plant.

In any event, Helm has failed to prove by a preponderance of the evidence that even if the representations about continuous run time and CIP shut-down time were representations of fact rather than promises, the representations were material or that Helm relied on them.

IV

CONTRACT CLAIMS

Helm argues that the evidence adduced during the arbitration hearing clearly establishes the materiality of the promises regarding run time and shut-down time, and that the interim award applied the wrong standard in its conclusion as to materiality. Helm argues that there is a special standard in the sale of goods that must be applied in commercial contexts such as existed with respect to the Alfa-Helm Agreement. Helm urges the Arbitrator to apply

the "substantial impairment" standard to the evidence of this case and to thereupon permit rescission of the Alfa-Helm Agreement.

Alfa argues that the "substantial impairment" test applies only to acceptance of revocation, and that traditional contract rescission analysis should be applied to the issue of whether the Alfa-Helm Agreement can be rescinded.

In the interim award, the Arbitrator addressed the materiality standard applicable in traditional "rescission and damages" cases in California contracts. After considering that standard again in light of the evidence adduced during the hearing of this case, the Arbitrator continues to believe that Helm failed in its burden of proof as to the materiality of the breach regarding run time and shut-down time, and that in any event, Helm failed in its burden of proving that it provided upstream equipment and utilities which would permit the Alfa processing lines to produce paste at the contracted rate of 25,366 pounds per hour. Further, Helm failed in its burden of proving that it had provided Alfa sufficient time within which to provide appropriate repairs, adjustments or "redesign" of the paste lines.

At Helm's request, the Arbitrator has further reexamined the evidence submitted at the hearing of this case in light of the "substantial impairment" test set forth in Commercial Code Section 2608. California Commercial Code Section 2711 provides that where the buyer justifiably revokes acceptance, the buyer may cancel the contract and in addition to recovering so much of the price as has been paid, the buyer may cover and have damages arising from the cover, or may recover damages for non-delivery, as provided in Commercial Code Sections 2713 and 2715. Section 2713 permits recovery of incidental damages and consequential damages as described in Section 2715. Although prior to its motion for reconsideration Helm had not sought revocation of acceptance and appropriate buyer's remedies under the

Commercial Code, the practical effect of these Commercial Code sections is very close to the relief sought by Helm in its request for rescission and damages.

Helm cites *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 279 Cal.Rptr. 533 as support for the proposition that the failure of the paste line equipment to meet the run time and shut-down time parameters materially impaired the value of that equipment to Helm.

Helm invokes the *U.S. Roofing* idea that "perhaps the strongest evidence of the impairment of value" is the difference between the amount the equipment is originally sold for and the amount it brings at resale. However, this formulation assumes that there was a resale market, evidence for which was not presented. In light of the existing oversupply of tomatoes and tomato processing plants in California, such an assumption cannot be made in this case. Thus, the fact that the equipment has not been resold is of no help in determining whether there was a substantial impairment in the value of the paste processing equipment to Helm.

In *U.S. Roofing*, the "goods" that were the subject of the case consisted of a crane used in roofing commercial buildings. In finding that the plaintiff properly revoked acceptance of the crane, the court recited a number of evidentiary findings by the trial court, including that the crane was unstable so that it leaned against the building upon which it was working; the crane was "unsafe"; the crane had problems in lifting to its capacity; various structural members of the crane showed cracks and poor welds; and that there was a 25 mile an hour limit on its speed on any road surface other than a level grade. These factors led the court to conclude that the value of the crane to U.S. Roofing in its particular applications to U.S. Roofing's business was "substantially impaired." As further evidence, the court noted

that the crane was resold for $60,000, as against its original purchase price of $116,000.

In our case, Helm purchased equipment for a plant by which tomatoes were to be rendered into aseptic tomato paste. The tomato paste was to meet certain color, viscosity, freedom from extraneous material and asepticity standards, and was to be produced at the rate of 25,366 pounds per hour consistently over a 75 to 90-day tomato processing season. As an "adjunct" to producing aseptic tomato paste at this capacity, the processing equipment was to run for 10 to 12 days continuously, interrupted by shut-down times of two to three hours. The evidence supports the conclusion that the equipment would not run 10 to 12 days continuously, and that a shorter continuous run time was more likely. Further, the evidence supports the conclusion that the shut-down times would probably exceed three hours. It appears that all of the other specifications with respect to the equipment were either met, or in the case of the capacity warranty, were waived by Helm because no capacity testing was done, and because Helm prematurely barred Alfa from further adjustment of the tomato paste processing equipment.

The processing equipment running continuously for a shorter period of time and requiring a longer period of shut-down time than that specified in the Agreement does not in the Arbitrator's view "substantially impair" the value of the processing equipment to Helm. At most, failure of the lines of Contherm units to meet these time parameters will delay to some extent the processing of the tomatoes delivered to the plant.

If Mr. Westcott's testimony is credited, the delay calculated over the life span of the processing season amounts to little more than two to three days. Helm did not meet its burden of proving that such a delay would be an important factor in processing the tomatoes to be delivered to Helm by

growers under contract to Helm or in timely delivering finished paste to buyers. There is such an inherent flexibility in the length of the processing season that it is unlikely that two to three days difference in time to process tomatoes to paste over an entire season would "substantially impair" the value of the tomato processing equipment to Helm.

However, it is possible that the failure of the tomato processing equipment strictly to adhere to the run time and shut-down time parameters might render operation of the equipment more costly, and therefore entitle Helm to a credit on the amount due to Alfa on the Sale Agreement. Presumably, that evidence will be produced at the next hearing.

In conclusion, of significant import to the Arbitrator were the facts that the Helm plant was constructed with insufficient lead-time and no time within which to properly commission the plant; that no capacity tests were performed pursuant to the terms of the Sale Agreement; that Helm prematurely barred Alfa from the processing plant and prohibited further redesign or retooling of the processing equipment; that Helm failed to prove that the upstream equipment and utilities were adequate; and that independent economic and market conditions played a substantial role in Helm's decision to shut down the plant and sell it.

DATED: September 24, 1992.

/s/ JOHN E. PETERSON

John E. Peterson

TED R. FRAME #023736

LAW OFFICES OF
FRAME & MATSUMOTO
201 Washington Street
P.O. Box 895
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ATTORNEYS FOR: Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC., *Plaintiffs,* vs. ALFA-LAVAL FOOD & DAIRY CO., ALFA-LAVAL CREDIT AB, THOMAS W. HINCZ, W. STANLEY PRITCHARD, THOMAS BAILEY, and DOE 1 through DOE 20, inclusive, *Defendants.*	CASE NO. 425766-3 DECLARATION OF ROBERT GLASSMAN IN SUPPORT OF PETITION TO VACATE ARBITRATOR'S AWARD DATE: December 29, 1992 TIME: 9:30 a.m. DEPT: 1

STATE OF CALIFORNIA, COUNTY OF FRESNO:

I, ROBERT GLASSMAN, have personal knowledge of all facts stated in this declaration, and if called as a witness, could and would competently testify to them under oath.

I am Vice President and Chief Financial Officer of BRITZ, INC., HELM CONCENTRATES, INC. and HELM TOMATOES, INC., the plaintiffs herein. I reside in Fresno, California.

I was at the McCORMICK, BARSTOW offices, in Fresno, on October 29, 1991. I was there because my deposition was being taken there in the course of the BRITZ/ALFA-LAVAL arbitration proceedings. While I was there, I saw MARSHALL WHITNEY, a member of the McCORMICK, BARSTOW firm.

I had known MARSHALL WHITNEY for many years on both a personal and professional basis. He had represented me and some business associates in litigation in the Federal Court. Thus I naturally spoke with him at the McCORMICK, BARSTOW offices when I encountered him in the hallway during a break in the deposition proceedings. After exchanging pleasantries, MARSHALL inquired why I was in his offices, and I advised him I was attending depositions in the BRITZ/ALFA-LAVAL matter, in which his firm represented the opposing party, ALFA-LAVAL. He asked me who the arbitrator was. I told him that the arbitrator was JOHN PETERSON of JORY, PETERSON & SAGASER. I asked him what he thought of JOHN PETERSON. He told me that PETERSON was a good man or words to that effect. We had no further conversation on this subject until June 1992.

When I talked to MARSHALL WHITNEY on October 29, 1991, he did not say anything about referral of cases

by him to JOHN PETERSON or by McCORMICK, BARSTOW to JOHN PETERSON or to JOHN PETERSON's firm, and he did not allude in any manner whatsoever to any such referral relationship.

I placed a call to MARSHALL WHITNEY during the morning of June 22, 1992. I was in my office at 1338 W. Indianapolis Street, Fresno. He was not in his office, and I left a call-back message. He returned my call at approximately 1:15 p.m. the same day. I was not in my office when he returned the call. I called him back at approximately 4:00 p.m. the same day, and I talked with him at that time.

When WHITNEY answered my call at about 4:00 p.m. on Monday, June 22, 1992, he sounded like he was using a speaker phone. I asked him if he was using one. He said that he was, but that he was alone. He said that he was packing his briefcase to go out of town.

I told WHITNEY that JOHN PETERSON had ruled against us in the BRITZ/ALFA-LAVAL arbitration. He said, "You should have used me". I said, "I couldn't, you're on the other side". I then asked him if McCORMICK, BARSTOW referred cases to the JORY, PETERSON firm. He said that he had personally made two or three referrals to JOHN PETERSON recently, within the last year or two, and that PETERSON was a very good attorney. I thanked him for the information and hung up the phone. He did not tell me that in November-December, 1991, McCORMICK, BARSTOW had hired JOHN PETERSON as an expert witness.

Before my June 22, 1992 conversation with MARSHALL WHITNEY, I had no knowledge that McCORMICK, BARSTOW or attorneys in that firm referred cases to JORY, PETERSON or to attorneys in that firm.

Before I saw a copy of JOHN PETERSON's July 15, 1992, letter to the AMERICAN ARBITRATION ASSO-

CIATION (which I saw after July 15, 1992), I had no knowledge that JOHN PETERSON was serving as an expert witness for the McCORMICK, BARSTOW firm at the time of the arbitration hearing or at any other time.

I have read a copy of CRAIG WHITE's July 14, 1992 letter to RON McNAIR of the AMERICAN ARBITRATION ASSOCIATION. The statement by WHITE that in the fall of 1991, I had a phone conversation with MARSHALL WHITNEY wherein I asked him about JOHN PETERSON's reputation, and WHITNEY "alluded to the fact that he [PETERSON] was with a law firm which was one of several that McCORMICK, BARSTOW referred clients to in the event of a professional conflict of interest" is a false statement. I did not discuss JOHN PETERSON with MARSHALL WHITNEY, by telephone or in person, in the fall of 1991, or for that matter, at any other time before June 22, 1992, except as set forth above.

If I had known at the time when JOHN PETERSON was selected as arbitrator that PETERSON was on McCORMICK, BARSTOW's referral list, I would have objected to his being appointed as arbitrator, and if I had known at or before the beginning of the arbitration hearing that PETERSON was on McCORMICK, BARSTOW's referral list or that he was serving as an expert witness for McCORMICK, BARSTOW on other cases, I would have objected to his hearing our case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Fresno, California, December 8, 1992.

/s/ ROBERT GLASSMAN

Robert Glassman

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUN 26 1992

June 25, 1992

Ted R. Frame, Esq.
FRAME & MATSUMOTO
201 Washington Street
Post Office Box 895
Coalinga, California 93210

Re: Alfa-Laval Food and Dairy Co. and Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. Frame:

I have your letter of June 24, 1992, and I have these comments. As you know, and have known for some time, our firm limits its practice to commercial litigation and to labor relations from the management perspective. Over the years, we have and received referrals from many firms in Fresno County, the San Joaquin Valley and the State of California. In fact, you have kindly referred to us at least one case in which we billed significant fees.

There is no special relationship between me or our firm and the McCormick, Barstow firm. However, I am advised that we are on McCormick, Barstow's list of referral firms. We have received referrals from that firm in the past, and our firm has referred matters to that firm.

Although not strictly analogous, within the last six months, you began representation of a group of Mendota area water users of which one of my clients, Fordel, Inc., is a member, with our approval.

When I accepted the assignment of this arbitration, I believed, and I continue to believe, that the McCormick, Barstow firm would not be involved in the arbitration. I have seen nothing since then to change that perception. I do not know the present relationship, if any, between McCormick, Barstow and Alpha-Laval. I do know that the McCormick, Barstow attorney who was primarily responsible for the case, Ollie Wanger, is now a sitting federal judge.

Some of our firm's hardest fought, bitterest cases have been against the McCormick, Barstow firm. In fact, you may recall the *Gerawan* case involving plum tree defoliation in which you represented Britz Chemical and Mario Beltramo of McCormick, Barstow represented Chevron as Defendants, and I represented Gerawan as Plaintiff.

Without examining my files in detail, it is my estimate that our firm has had as many cases adversarial to McCormick, Barstow as it has referrals from that firm. In any event, it is inconceivable to me that any decision I might make in this case would be affected in the slightest by the fact that I am on McCormick, Barstow's referral list.

I have carefully read Rule 1606(a) of the California Rules of Court, and California Code of Civil Procedure Section 170.1. Neither of those sections compels or even suggests the disclosures you request in your June 24, 1992 letter, so I respectfully decline your request.

I understand your clients' concerns and the necessity for you to write as you did. However, please assure your clients that the fact that the McCormick, Barstow firm represented Alfa-Laval in the underlying Superior Court action has had absolutely no impact on my consideration of this case.

Further, I wish to assure Alfa-Laval that your having referred the La Cuesta Verde-Cassio case to me has likewise had no impact.

You are a capable and talented lawyer, and I look forward to working with you in the future.

Very truly yours,

/s/ JOHN E. PETERSON

John E. Peterson

JEP/cc

cc: Mr. Ron McNair
Craig White, Esq.

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUL 10 1992

July 9, 1992

Mr. Ronald McNair
AMERICAN ARBITRATION ASSOCIATION
Post Office Box 57994
Los Angeles, California 90057-0994

Re: Alfa-Laval Food & Dairy Co. and
Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. McNair:

I returned from vacation on July 6, 1992, and have now read the exchange of correspondence dated June 29, 1992, and after between Mr. Frame and Mr. White. I have these comments on Mr. Frame's letter of June 29, 1992.

I am aware of the cases he cites and of Rule 19 of the American Arbitration Association. In the past, when I have arbitrated a matter involving a party represented by the McCormick, Barstow firm, I have advised the American Arbitration Association that I have been on McCormick, Barstow's referral list. I would have done so in this case had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, or in any other capacity.

The June, 1991 motion for summary judgment provided no new information. I knew in April 1991 that McCormick,

Barstow had represented Alfa-Laval in the Superior Court action. To the best of my knowledge then, and since then, McCormick, Barstow was not to be, and was not, involved in the arbitration.

As to the May 20, 1991 inspection, my notes do *not* reflect the presence of an attorney from McCormick, Barstow, and to the best of my recollection, no such attorney was present.

Finally, as to the December 2, 1991 McCormick, Barstow letter about the deposition subpena, the writer, John T. Savrnoch, was unknown to me at the time, and remains unknown to me. Further, that letter reflects nothing more than a local accommodation of the Chicago-based Wildman, Harrold firm.

My reluctance to make the disclosures Mr. Frame requests arises from my belief that such disclosures are irrelevant, given my belief as to the lack of any relationship between Alfa-Laval and the McCormick, Barstow firm after the order was entered in Superior Court requiring arbitration. None of the communications from Mr. Frame, the Wildman, Harrold firm or the American Arbitration Association indicated the involvement of McCormick, Barstow in the arbitration, although I do recall an off-the-record suggestion that we use a McCormick, Barstow conference room for a day. If Alfa-Laval had an attorney-client relationship with McCormick, Barstow during the pendency of the arbitration, it was unknown to me. Mr. Savrnoch's December 2, 1991 letter did not, and does not, change that knowledge.

In any event, without in any way conceding the relevance of these disclosures, please be advised that I am aware of the following matters.

It is my understanding of the McCormick, Barstow referral list process that its attorneys provide at least three names

of lawyers to persons needing such referrals, so that the client can choose among a number of names. I am not aware of any client to whom McCormick, Barstow gave only my firm's name. (Our firm's file set-up system did not begin to reflect the source of a client until late Spring, 1992.)

I have been asked (1985 through 1991) to testify as an expert defense witness in legal malpractice actions against the Baker, Manock & Jensen firm in Fresno, the Lang, Richert & Patch firm and the Motschiedler, Michaelides & Wishon firm. All were represented by the McCormick, Barstow firm. I do not know whether I was the choice of the Defendant law firms or of McCormick, Barstow, or both, but the initial contacts came from McCormick, Barstow.

Further, as to specific cases of which I have personal knowledge that within the past three years McCormick, Barstow had provided our name, or opposed us, please be aware of the following:

(1) *Dwight Nelson v. John Mackie*

Dwight Nelson was referred to me in Spring, 1989, by direct contact from Marshall Whitney, a partner of McCormick, Barstow. This was a legal malpractice action which settled in March, 1992. Since then, Dwight Nelson has directed a number of litigation matters to our firm, which has caused some discomfort between me and Mr. Whitney.

(2) *Lindley v. U.S. Home, et al.*

Our firm represented Plaintiffs Lindley in this case, against, among others, U.S. Home, represented by McCormick, Barstow. The case recently settled for approximately $340,000.

(3) *Chassey v. Mutual of New York, et al.*

McCormick, Barstow represented Plaintiff and our firm represented Defendants in this wrongful termination case. In

April, 1992, a jury awarded Plaintiff $250,000 against the corporate Defendant.

(4) *Bishop v. Arrow Electronics*

McCormick, Barstow represented Plaintiff and our firm represented Defendant Arrow Electronics. A jury returned a verdict of $300,000 for Plaintiff in February, 1992.

(5) *Harter v. Chow*

Our firm represented Plaintiff John Harter, and McCormick, Barstow represented Defendant landlord. This case settled, after a rather vituperative deposition of Steve Rau, one of McCormick, Barstow's transactional lawyers. The case settled in 1991 very favorably to Harter.

(6) *City of Fresno v. Riverview Estates*

In one of the last cases handled by Ollie Wanger, now a Federal judge, McCormick, Barstow represented the City of Fresno against my client, Riverview Estates. The subject of the action was the City's allegation that my developer clients had attempted to defraud the City into accepting an 11 acre dump site as a park. This high profile case settled to the mutual benefit of the parties in the Summer of 1990.

(7) *First American Title*

I believe my name was mentioned by a McCormick, Barstow lawyer to First American Title Insurance Company involving a case in which McCormick, Barstow had a conflict of interest. Since then, First American has sent additional cases to us rather than to McCormick, Barstow.

(8) *Bank of Fresno*

Until two years ago, our firm did all of Bank of Fresno's litigation. At that time, McCormick, Barstow took over the regulatory representation from Pettitt & Martin, a San Francisco law firm, and acquired the litigation work with it.

To provide these disclosures I looked at our list of active matters, but I did not inquire of other lawyers in the firm as to their knowledge or recollection of matters involving McCormick, Barstow.

At no time has our law firm, or any attorney in our law firm, paid a referral fee to McCormick, Barstow, or received a referral fee from that firm. To reiterate, there is no relationship between our firm and McCormick, Barstow different from that between our firm and any other Fresno County firm, including Mr. Frame's firm.

As final notes, with respect to the Mendota water users, Mr. Frame's representation of my client in connection with that group was effectively my decision; and the *Cassio* case was not resolved until Spring, 1989.

To reiterate, the disclosures, Mr. Frame requests are extremely difficult, because we have no records which will tell us which cases came from the fact that we were on a list of a number of attorneys given by McCormick, Barstow to calling clients. Although it is not obvious to me how these disclosures are helpful to anyone, I have provided them so that Mr. Frame can be assured that his clients have received, and will continue to receive, fair and impartial consideration in this case.

Very truly yours,

/s/ JOHN E. PETERSON

John E. Peterson

JEP/jr

cc: Ted R. Frame, Esq.
Craig White, Esq.

[JORY, PETERSON & SAGASER LETTERHEAD]

RECEIVED
JUL 17 1992

July 15, 1992

Mr. Ron McNair
Case Administrator
AMERICAN ARBITRATION ASSOCIATION
Post Office Box 57994
Los Angeles, California 90057-0994

Re: Alfa-Laval Food and Dairy Co. and
Helm Concentrates, Inc., et al.
AAA Case No. 72199 2101 90

Dear Mr. McNair:

The purpose of this letter is to respond to Mr. Frame's of July 13, 1992, and to the concerns expressed in it.

In order to prepare this letter, I have personally spoken to each of the lawyers in our firm, and inquired as to referrals to, referrals from, and all other relationships between each lawyer and the McCormick, Barstow firm. My reason for not doing so in preparation of my letter of July 9 was my belief that I could not possibly be biased or prejudiced by information I did not possess. However, if it will help allay Mr. Frame's concerns, this information is provided to correspond to the labeled parts of Mr. Frame's letter.

A. To the best of our lawyers' current recollections, within the last three years, five matters have originated in

our office and have been received ultimately by the McCormick, Barstow firm, as follows:

(1) *Golden State Peterbilt*

This trucking firm was referred by Andrew Wright of the McCormick, Barstow firm to my partner, Howard A. Sagaser, for negotiation of a start up labor contract. Later, the company ran into financial difficulties, so Riley Walter of the McCormick, Barstow firm filed for bankruptcy protection.

(2) *Harris Farms — Urias*

The employer, Harris Farms, retained us to represent it in this wrongful termination action. Mr. Sagaser tendered defense to the client's insurance carrier, which accepted. The carrier then required that the case be transferred to Lowell Carruth of the McCormick, Barstow firm. The case is pending.

(3) *Cal West*

This client of ours was a defendant in a wrongful termination case which followed the same scenario as set forth above. It has been settled.

(4) Mr. Sagaser recalls that another case was treated similarly, and sent to Steve Cornwell. He does not recall the client or case name, but the case has been resolved.

(5) *John Brelsford*

Mr. Brelsford's company, Diversified Development, was a defendant in a commercial case and retained us to defend the company. However, Steve Rau of McCormick, Barstow is his transactional lawyer, so the case was ordered by the client to be transferred to McCormick, Barstow.

(6) *Tim Crough Construction*

This client was referred to Jay Jory by Steve Rau of the McCormick firm. When a conflict of interest arose with respect to a litigation matter involving one of our existing clients, the matter was referred back to Mr. Rau.

We believe that there may be other matters about which we were consulted but which we could not accept and which have found a home in the McCormick, Barstow firm. We follow a procedure similar to that of the McCormick, Barstow firm, in that we will include lawyers of that firm in the process of providing a number of names to clients or prospective clients in situations where we cannot accept the representation. However, it is up to the client or prospective client to make the contact with the McCormick, Barstow firm and the other firms mentioned by us and to make the choice of representation.

B. These are other matters involving the McCormick, Barstow firm recalled by our lawyers.

(1) *Stockdale Partners*

Eric Hansen and Russ Ryan worked on this matter referred by the McCormick, Barstow firm. Our representation has essentially concluded.

(2) *Miller v. Zurich, Bodine v. Fireman's Fund*

These insurance coverage disputes were referred to Mike Smith by Tim Jones of the McCormick, Barstow firm. One is a contingent fee case and the other was taken on an hourly basis.

(3) *Chrisman v. AT&T*

This matter was referred as a conflict matter by McCormick, Barstow. Our firm represents the plaintiff in this hazardous waste case. Mike Smith is the primary attorney from our firm involved.

(4) *Paul McClean—Pavelich*

Rick Docker of the McCormick firm referred this case to Don Franson and me. Mr. Franson is primarily responsible for the case, which involved defending the examination of a judgment debtor.

(5) *Ellis & Thomason v. Bonadelle*

Howard Sagaser represented plaintiff Ellis & Thomason in this case, in which Greg Durbin of McCormick, Barstow represented defendant, in a hotly contested dispute regarding real property. That matter has been settled.

(6) *Terranova Ranch*

Terranova Ranch, Mr. Sagaser's client, was sued in a case in which Lowell Carruth of the McCormick, Barstow firm represents plaintiff. That matter has been settled.

C. I was consulted and agreed to serve as an expert witness in these matters in which McCormick, Barstow represented attorney firms as legal malpractice defendants:

(1) *Forte v. Lang, Richert & Patch*

I was initially contacted in late 1984 or early 1985. I provided deposition testimony and trial testimony on behalf of defendants. The case resolved favorably to defendants in September 1985.

(2) *Bilveu v. Baker, Manock & Jensen*

Larry Wayte of McCormick, Barstow firm contacted me in about November 1991. I have reviewed the pertinent transcripts and documents in the case, and have provided an oral opinion to Mr. Wayte. If this matter goes to trial, I expect to testify.

(3) *Fansler v. Motschiedler, Michaelides & Wishon*

Marshall Whitney of the McCormick, Barstow firm contacted me in December 1991 regarding testimony in this

case. I have reviewed appropriate documents and transcripts, provided an oral opinion, and given deposition testimony. If this case goes to trial, I expect to testify.

D. No other attorney in our firm has been consulted as an expert by, or testified on behalf of, McCormick, Barstow clients.

E. Not having been party to the conversation to which Mr. Frame refers, it is difficult for me to respond. However, I am aware that Mr. Whitney mentioned our name, and others, as potential attorneys for plaintiffs' legal malpractice cases. Two of those potential plaintiffs contacted me, and I declined the representation. Both clients indicated that I was one of three different firms mentioned by Mr. Whitney. Further, Mr. Frame's letter prompted me to look at my list of inactive matters; and I was reminded that at Mr. Whitney's request, I provided a legal opinion to the members of the city council of Hanford regarding their personal exposure in connection with an attempt by GWF to construct a coal-powered co-generation plant in the City of Hanford. This file closed in March 1990.

The McCormick, Barstow firm has an excellent reputation in the San Joaquin Valley for litigation. When we cannot take a litigation matter because of a conflict of interest, that firm is consistently one of two or three firms the names of which we provide to clients or prospective clients seeking our services. However, we do not keep track of the number of times, or of the clients, in which, or to whom, we have provided McCormick, Barstow's name.

Although Mr. Frame did not request this information in his July 13 letter, I should disclose that when I discussed the McCormick, Barstow firm with my partner Mike Smith, he advised me that at some time in the Fall of 1991, Mr. Robert Glassman, one of the representatives of the Helm Group, hand-delivered a check drawn on Britz Chem-

ical payable to American Western Banker, for the benefit of one of our clients, Mr. Doug Maddox. I remember seeing Mr. Glassman at the time, but he and I did not speak. Mr. Smith saw no reason to advise me of the visit, nor of subsequent payments made by Britz Chemical into our trust account on behalf of Mr. Maddox, which Mr. Smith assumed were in the nature of loans to Mr. Maddox.

Further, my partner Howard Sagaser has informed me that Mr. Frame and our office share mutual clients such as Dick Hewitson and Phil Sagaser, who is Howard Sagaser's brother.

I can say with absolute certainty that none of the disclosures I have made in this letter or in my June 9, 1992 letter are relevant to my consideration of the law and facts in the Alfa-Laval/Helm case. These disclosures reflect the fact that I am known in the general legal community, and in the same legal and business circles as the McCormick, Barstow firm, and Mr. Frame's firm.

The remaining content of Mr. Frame's letter appears to consist of argument about the need for disclosure and about conclusions I have drawn from my observations during the course of arbitration of this case. Suffice it to say that I disagree with Mr. Frame's arguments, except to the extent reflected in my letters of June 25, July 9 and today.

In conclusion, we consider the McCormick, Barstow firm to be a major competitor in the arena of commercial litigation. We provide names of their attorneys as well as other firms in that context because we know the client referred will be well served. I believe that they feel similarly about us. Similar considerations have led me to mention Mr. Frame's name in connection with legal matters involving the west side of the San Joaquin Valley. I reiterate, however, that all of this is simply irrelevant to the Alfa-Helm arbitration.

I believe that at all times in this matter, I have acted in accordance with Cannon II of the Code of Ethics for arbitrators in commercial disputes. Quite frankly, I consider the interests and relationships indicated in my correspondence on this subject as trivial.

I look forward to further discussion of this matter with you at your convenience.

Very truly yours,

/s/ JOHN E. PETERSON
John E. Peterson

JEP/jr

cc: Ted R. Frame, Esq.
Craig M. White, Esq.

TED R. FRAME #023736
LAW OFFICES OF
FRAME & MATSUMOTO
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P. O. Box 895
Coalinga, CA 93201
Telephone: 209/935-1552
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ATTORNEYS FOR: Plaintiffs

FILED
APR 21 1993
FRESNO COUNTY CLERK
By _____
G.R.-DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

BRITZ, INC.,
HELM CONCENTRATES, INC., and
HELM TOMATOES, INC.,

Plaintiffs/Petitioners,

vs.

ALFA-LAVAL FOOD & DAIRY CO.,
ALFA-LAVAL CREDIT AB,
THOMAS W. HINCZ,
W. STANLEY PRITCHARD,
THOMAS BAILEY, and
DOE 1 through DOE 20, inclusive,

Defendants/Respondents.

CASE NO. 425766-3

SUPPLEMENTAL DECLARATION OF TED R. FRAME IN SUPPORT OF PETITION TO VACATE ARBITRATOR'S AWARD

DATE: May 28, 1993
TIME: 8:30 a.m.
DEPT: 7

STATE OF CALIFORNIA, COUNTY OF FRESNO:

I, TED R. FRAME, make the following declarations.

I am one of the attorneys for the plaintiffs.

I have firsthand knowledge of all of the facts stated in this declaration, and if called as a witness, I could and would competently testify to them under oath.

I have carefully examined each of the documents attached to this Declaration as an exhibit. Whenever I refer to an exhibit in this Declaration, I refer to those documents. Each of those documents is a document or a copy of a document sent or received by me. Each of them was sent or received by me in the ordinary course of business, and each of them, or the copies, as the case may be, has been in my possession or under my control since they were sent or received. The copies are true copies in each instance.

SUPPLEMENTAL CHRONOLOGY

Since the previous hearing in this matter, December 23, 1992, the following events have occurred:

1. A short time after the December 23, 1992, hearing in this Court, we filed a Petition for Writ of Mandate with the Court of Appeal, Fifth Appellate District. We did so on January 8, 1993, and on February 1, 1993, we requested a stay of the arbitration hearing scheduled for February 22, 1993. The ALFA-LAVAL parties filed responses. The Petition for the Writ and the request for the stay were denied by the Court of Appeal on February 11, 1993. Copies of the Court of Appeal filings are on file in this Court, and this Court is requested to take judicial notice of them. McCORMICK, BARSTOW and WILDMAN, HAROLD appear as co-counsel for the ALFA-LAVAL parties in all of those filings.

2. On January 28, 1993, we requested the arbitrator to continue until a later date the arbitration hearing scheduled for February 22, 1993, and on the same date, the arbitrator refused to do so. (Exhibits "A" and "B").

3. On February 4, 1993, we requested the AMERICAN ARBITRATION ASSOCIATION to reconsider its previous refusal to remove the arbitrator. We did so through associate counsel in Los Angeles. (Exhibit "C"). On February 18, 1993, the AMERICAN ARBITRATION ASSOCIATION again refused to remove the arbitrator. (Exhibit "D").

4. On February 17, 1993, I requested the arbitrator to update his July, 1992, disclosures. I did so by facsimile to the arbitrator. (Exhibit "E").

5. The arbitrator responded by facsimile the same day. (Exhibit "F"). In his response he states that his firm no longer is performing services in the *Stockdale Partners* case or the *Bodine v. Fireman's Fund* case, but that his firm continues to perform services in the *Miller v. Zurich* case, the *Chrisman v. AT & T* case, and the *McLean - Pavolich* case. He also states that his July, 1992, disclosure was incomplete: Another case, *Pitman v. Amco*, was referred to his firm by McCORMICK, BARSTOW in April, 1992. The referral was a personal referral, by GREG DURBIN of McCORMICK, BARSTOW.

6. The arbitrator attaches to his February 17, 1993 response (Exhibit "F") a copy set of his invoices to McCORMICK, BARSTOW for his employment by McCORMICK, BARSTOW as an expert witness during the pendency of the arbitration.

7. On February 19, 1993, I responded to the arbitrator's February 17, 1993, facsimile to me. (Exhibit "G"). I requested the arbitrator to recuse himself. He did not do so.

8. The second phase of the arbitration (the damages phase) was heard by the arbitrator, JOHN PETERSON, February 22, 1993, through February 25, 1993.

FULLERTON, LANG law firm. I had no part in his selection, I did not confer with him before or after he was selected, and to the best of my recollection, I was not present when he testified.

d. For the foregoing reasons, I did not have in mind at the time of PETERSON's selection as the arbitrator herein, or at the time of the January, 1992, hearings, or subsequently until his July, 1992, disclosures, that he had testified for McCORMICK, BARSTOW in 1985; and before July, 1992, I had no indication, no inkling, or no knowledge that he would be hired or was hired by McCORMICK, BARSTOW in November of 1991 and again in December 1991.

I declare under penalty of perjury that the foregoing is true and correct.

9. On March 16, 1993, the AMERICAN ARBITRATION ASSOCIATION notified the arbitrator that the Final Award was due on or before April 15, 1993. (Exhibit "H").

10. On or about March 30, 1993, McCORMICK, BARSTOW filed herein an Application for Pro Hac Vica appearances by CRAIG M. WHITE and THOMAS J. VERTICCHIO. The application has a hearing date of April 26, 1993.

11. On April, 8, 1993, we received from the AMERICAN ARBITRATION ASSOCIATION a copy of the arbitrator's Final Award. (Exhibit "I").

12. On April 19, 1993, we objected, by letter to the AMERICAN ARBITRATION ASSOCIATION, to the issuance by the arbitrator of any supplemental award for attorneys' fees and costs of suit. (Exhibit "J").

RELATED MATTERS

1. Attached hereto, marked Exhibit "K", and by reference incorporated herein, is the Notice of Taking Deposition of Ray Medeiros, with attached Deposition Subpena. Both are dated November 7, 1991, both were issued by McCORMICK, BARSTOW, and both were for use in the January, 1992, arbitration hearing. (The Superior Court action had been stayed). Numerous other subpenas for depositions and documents for use in the arbitration also were issued by McCORMICK, BARSTOW. Copies for some of them are attached hereto as Exhibits "L", "M", "N", "O", and "P", and by reference they are incorporated herein.

2. A copy of the December 2, 1991, letter from the arbitrator to McCORMICK, BARSTOW, a more legible copy than the one previously submitted, is attached hereto as Exhibit "Q". A copy of the arbitrator's response, dated December 6, 1991, is included for convenient reference.

3. When I appeared at the previous hearing herein, December 23, 1992, the petitioners herein were represented by STEPHEN CORNWELL of McCORMICK, BARSTOW. CRAIG WHITE, of WILDMAN, HAROLD, also was present. CORNWELL, during his closing argument, stated that I knew that McCORMICK, BARSTOW had hired the arbitrator herein, JOHN PETERSON, to testify as an expert witness in a Superior Court case in 1985.

The case referred to by CORNWELL was a case entitled *Forte v. Fullerton, Lang, Richert & Patch,* et al. The circumstances were the following ones:

a. The plaintiff in the case, EUGENE FORTE, was suing the FULLERTON, LANG firm for malicious prosecution and was suing its former clients, HENRY MIKAMI and FRANK UYESAKA, for fraud and other assorted causes of action. LAWRENCE WAYTE of McCOR-

MICK, BARSTOW represented the FULLERTON, LANG law firm. I represented MIKAMI and UYESAKA.

b. Because of the trial, which started in May, 1985, was a relatively long one, because my office was (and still is) a small one (at that time me and an associate, TOM ALLEN), and because MIKAMI and UYESAKA had limited financial resources, I was not present during the entire trial. During the phases of trial which affected the FULLERTON, LANG law firm and did not affect MIKAMI and UYESAKA, my associate, TOM ALLEN, was present, and I was not.

c. JOHN PETERSON was engaged by McCORMICK, BARSTOW to testify as an expert witness regarding the claims against the Executed at Coalinga, California, April 19, 1993.

/s/ TED R. FRAME
Ted R. Frame

[FRAME & MATSUMOTO LETTERHEAD]

EXPRESS MAIL
FAXED 213-386-2251

July 21, 1992

Mr. Ron McNair
Case Administrator
American Arbitration Association
P.O. Box 57994
Los Angeles, CA 90020-0994

RE: 72199 2101 90
Alfa-Laval Food & Dairy Co., a Division of
Alfa-Laval, Inc.
-and-
Helm Concentrates, Inc., Britz, Inc., &
Helm Tomatoes, Inc.

Dear Mr. McNair:

We have received a copy of the Arbitrator's July 15, 1992 letter to you. After reflecting on the contents of the letter, and for the following reasons, we object to the continued service of the Arbitrator. For the same reasons we respectively suggest to the Arbitrator that he grant our clients' pending Request for Reconsideration, solely for the purpose of vacating his Interim Award so that the liability phase of the arbitration can be reheard *de novo* by a new arbitrator. I believe that ethical considerations require him to do so.

Employment as Expert Witness.

The most telling reason for disqualifying the Arbitrator and for vacating his Interim Award is his having performed

services for the McCormick, Barstow firm during the pendency of the Arbitration. Please note,

a. The McCormick, Barstow firm represents Alfa-Laval in the Superior Court action in which the pending arbitration was ordered. When a final award is made in the pending arbitration, the award will be confirmed or vacated in the Superior Court action. Also, the Superior Court action is not dormant. The Superior Court conducts Status Conferences, monthly or nearly so, monitoring the status of the arbitration, and requires the parties to file written status statements.

b. The Arbitrator in the pending arbitration was appointed in January, 1991. The arbitration hearing (liability phase) was in January, 1992.

c. The Arbitrator, in the second paragraph of the first page of his July 9, 1992 letter to you, states that he would have advised the AAA that he was on McCormick, Barstow's referral list "had I believed that McCormick, Barstow represented Alfa-Laval in the arbitration, *or in any other capacity*". (Emphasis is ours).

d. The Arbitrator, in the third paragraph on the first page of his July 9, 1992 letter to you, states that he has been aware since April, 1991 that McCormick, Barstow represents Alfa-Laval in the Superior Court Action.

e. In December, 1991, McCormick, Barstow actively represented Alfa-Laval in a disputed discovery motion in the arbitration. (Please see the fifth paragraph of my July 15, 1992 letter to you).

f. In November, 1991, the Arbitrator accepted an assignment from McCormick, Barstow as an expert witness in a case being handled by McCormick, Barstow. The case was the *Bilyeu v. Baker, Manock & Jensen* case.

The case was disclosed by the Arbitrator on page 4 on his July 15, 1992 letter to you.

g. In December, 1991, the Arbitrator accepted an assignment for McCormick, Barstow as an expert witness in another case being handled by McCormick, Barstow. The case is the *Fansler v. Motschiedlar, Michaelides & Wishon* case. The case was disclosed by the Arbitrator on page 4 on his July 15, 1992 letter to you.

h. The Arbitrator states in his July 15 letter to you that he has given deposition testimony in the *Fansler* case. The plaintiff in the case is represented by Attorney Richard C. Crossman of Parichan, Renberg, Crossman & Harvey, 2350 W. Shaw Avenue, Suite 130, P.O. Box 9950, Fresno, California 93794, telephone 209/431-6300. I talked with Crossman after receiving the Arbitrator's July 15 letter. Crossman told me that the date of the deposition was February 24, 1992. At that time, while the Arbitrator was testifying as McCormick, Barstow's expert, the Arbitrator was awaiting receipt of the parties' opening briefs in the pending arbitration.

Rule 19 of the AAA Commercial Arbitration rules states that any person who is appointed as neutral arbitrator shall disclose "any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration *or any past or present relationship with the parties or their representatives*". (Emphasis is ours). "Representatives" is a broad term, and the Rule does not limit or qualify the term's meaning.

Cannon I(d) of the *Code of Ethics for Arbitrators in Commercial Disputes* states,

"After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship,

or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest."

Cannon II states,

"A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration; (2) Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

B. Persons who are requested to accept appointment as arbitrators should make every reasonable effort to inform themselves of any interests or relationships described in Paragraph A above."

Upon accepting the expert witness assignments, the Arbitrator began to perform services for attorneys for a party to the arbitration. He did not disclose the assignment. There is no contention, and there cannot possibly be one, that our clients or we were aware of the assignments. Both assign-

ments occurred within two months of the commencement of the arbitration hearings.

In *Wheeler v. Saint Joseph Hospital* (California Court of Appeal, 1976) 63 CA3d 345, 369-372, and 379-380, the plaintiff's action, a medical malpractice action, named as defendants a hospital and two doctors. The action was filed in the Superior Court. Subsequently, the Superior Court made an order compelling arbitration. The arbitration was conducted pursuant to the Rules of the AAA, by an arbitration panel composed of a medical doctor, a lawyer, and a businessman. The doctor, Dr. H. L. Elmquist, was designated as the medical member of the panel. The arbitration hearings were held from December 9 through December 12, 1974, and from April 21 to April 25, 1975.

One of the *Wheeler* doctor defendants was represented in the Superior Court proceedings and in the arbitration proceedings by Attorney David Ruston of the law firm of Ruston & Nance. Unbeknown to David Ruston, Dr. Elmquist accepted an expert witness assignment from Ruston & Nance on November 27, 1974, in another, unrelated Superior Court case, and testified as an expert witness in that case on December 18, 1974. Neither Dr. Elmquist nor Attorney Ruston disclosed Elmquist's expert witness assignment. Attorney Ruston later explained that the occurrence "was simply the result of one member of a large firm not being aware of what another member was doing in an unrelated case". (63 CA3d 345, at 370).

The arbitration award was in favor of Attorney Ruston's client. The Court of Appeal vacated the award. The majority opinion by Justice Tamura states,

> "We conclude that the award should have been vacated by reason of Dr. Elmquist's failure to reveal to the parties his relationship with the firm of Ruston & Nance. We hasten to add that we do not imply that Dr. Elmquist was

guilty of any wrongdoing or that he was in fact biased or influenced by reason of the relationship. Nevertheless, as Justice Black emphasized in *Commonwealth*, such relationships must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be preserved."

A concurring opinion by Presiding Justice Gardner states,

> "I agree with the majority that neither Mr. Ruston nor Dr. Elmquist intentionally did anything wrong. I am positive that Mr. Ruston did not even know of Dr. Elmquist's retention by his firm in an unrelated lawsuit. I share Mr. Ruston's distress at the unprovoked and unrestrained attack made upon his professional integrity by opposing counsel. It was completely unnecessary and cannot be excused as advocate zeal. I am just as positive that it never entered Dr. Elmquist's mind that he was doing anything wrong. As the United States Supreme Court pointed out in *Commonwealth Corp. v. Casualty Co.* 393 U.S. 145 [21 L.Ed.2d 301, 89 S.Ct. 337], arbitrators cannot be expected to sever all their ties with the business world since they do not receive all their income from deciding cases. Dr. Elmquist is apparently a professional medical witness, not a lawyer or a judge, and probably thought nothing at all of accepting an assignment from Mr. Ruston's office while acting as an arbitrator in this case. Nevertheless, it happened and with or without *Commonwealth* or *Johnson v. Security Ins. Co.*, 6 Cal.App. 389 [86 Cal.Rptr. 133], the facts create an impression of possible bias and the award must be set aside. Litigants are prone to paranoia. Judges (and many arbitrators, too) live an uneasy life because of this.

> We not only must avoid evil, we must avoid the appearance of evil."

The facts in *Wheeler* and the pending arbitration differ because McCormick, Barstow did not represent Alfa-Laval at the arbitration hearing, but the rationale is the same because of McCormick, Barstow's continued interest in the outcome of the arbitration.

In the pending arbitration, the Arbitrator, at the time of the arbitration hearing, was employed by the attorneys for one of the parties. The conflict of interest is clearly delineated.

Referrals

The Arbitrator continues to fail to fully disclose referral information. In his July 15 letter to you he supplements his previous disclosure. He says that all of the referrals incurred "within the last three years" but for the most part he fails to say when during the three years. Also, we requested disclosure for a three-year period preceding the appointment of the Arbitrator and for the period since the appointment, not merely for the "last three years". Nevertheless, the number of referrals disclosed is impressive.

In the Arbitrator's July 9 letter to you, he discloses two referrals to his firm by McCormick, Barstow during the past three years, the *Dwight Nelson v. John Mackie* case and the *First American Title* case. In the Arbitrator's July 15 letter to you, he discloses eight referrals by name, *Golden State Peterbilt, Tim Crough Construction, Stockdale Partners, Miller v Zurich, Bodine v. Fireman's Fund, Christman v. AT & T, Paul McLean-Pavelich*, and the *City of Hanford* opinion, and he discloses two additional, unnamed referrals which he says he declined to accept. The total is twelve.

The Arbitrator's July 15 letter also discloses referrals to McCormick, Barstow.

The course of dealing between the Jory, Peterson firm and the McCormick, Barstow firm is a substantial business relationship between them. For Jory, Peterson, the relationship is a valuable one. Concededly the two firms also have an adversarial relationship, but the adversarial relationship is not the point here. The point here is the failure to disclose the referral relationship, the "I scratch your back and you scratch mine" relationship.

I realize that Alfa-Laval contends that Robert Glassman, one of Helm's principals, was told by Marshal Whitney of the McCormick, Barstow firm in the fall of 1991 that McCormick, Barstow referred cases to Jory, Peterson. Craig White in his July 14, 1992 letter to you, states that Whitney "confirmed Mr. Peterson's fine reputation and alluded to the fact that he was with a law firm which was one of several that McCormick, Barstow referred clients to in the event of a professional conflict of interest". (White's July 14 letter, second paragraph on page 2). I don't know what "alluded" means. Glassman denies that the conversation occurred. Even if it occurred, there is no contention by White that Whitney's allusion was anything more than a passing comment without any quantification.

In the seminal California case of *Johnston v. Security Ins. Co.* 1970) 6 CA3d 839, a witness in the arbitration was working on a case referred to the witness by the arbitrator at the time of the arbitration hearing. Here, in the pending arbitration, *Alfa-Laval v. Helm*, the Arbitrator's firm was working on cases referred to the Arbitrator's firm by attorneys for *Alfa-Laval* at the time of the arbitration hearing. See, for instance, the Arbitrator's description of the *Miller v. Zurich*, *Bodine v. Firemans Fund*, *Christman v. AT & T*, and *Paul McLean-Pavelich* cases, in the Arbitrator's July 15 letter to you.

In *Johnston*, the award is vacated. In doing so, the California Court of Appeal quotes Justice Hugo Black,

speaking for the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145, at 148-149,

> "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work regarding cases, but *we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.* We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias.*" (Emphasis is the *Johnston* Court's).

Conclusion

The Arbitrator states in the final paragraph of his July 15 letter to you that, "I consider the interests and relationships indicated in my correspondence on this subject as trivial". We respectfully submit that although the Arbitrator is well-intentioned, he misses the issue. The issue is that he failed to disclose matters he should have disclosed. He should have disclosed those matters so that the parties, not he, could have concluded whether those matters were significant. His failure to do so disqualifies him.

Yours very truly,

/s/ RUSSELL MATSUMOTO, for
Ted R. Frame

TRF:dlc
cc: John E. Peterson, Esq. (Fax/mail)
Craig White, Esq. (Fax/mail)
McCormick, Barstow, Sheppard,
Wayte & Carruth (mail)
Clients (mail)

RECEIVED
AUGUST 5, 1992

August 4, 1992

72 T199 2101 90 RM
Alfa-Laval Food and Dairy Co.,
A Div. Of Alfa-Laval, Inc.
-and-
Heim Concentrates, Inc.,
Britz, Inc., &
Helm Tomatoes, Inc.
AAA Rules: Commercial

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Diary Co
Wildman Harrold Allan & Dixon
225 West Wacker Dr #3000
Chicago, IL 60606

Ted R Frame Attorney
for Helm Concentrates etc
Frame & Matsumoto
P O Box 895
Coalinga, CA 93210

Dear Parties:

The Association has received and reviewed the parties various correspondence concerning the disclosure issue of the Arbitrator raised by Attorney Frame. We have also received the latest correspondence of Attorney White dated July 31, 1992.

Upon careful review by the Association and in accordance with Section 19 of the Commercial Arbitration Rules, it is the determination of the Administrator that the challenge submitted by Respondent to the Arbitrator's continued service be denied and Arbitrator John E. Peterson's appoint-

ment and continued service on the above-captioned matter is reaffirmed.

Sincerely,

/s/ ROCCO M SCANZA

Rocco M. Scanza
Assistant Regional Director
RMS/ct

Encl.

cc: John E. Peterson, Esq.

[COTKIN & COLLINS LETTERHEAD]

Received
Feb 8 1993

February 4, 1993

Mr. Rocco M. Scanza, Regional Director
AMERICAN ARBITRATION ASSOCIATION
3055 Wilshire Boulevard, 7th Floor
Los Angeles, California 90010-1108

Re: REQUEST FOR RECONSIDERATION
Arbitration No.: 72-199210190
Alfa-Laval Food and Dairy Company, A Division of Alfa-Laval, Inc. and Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc.
Our File No. : 212140011

Dear Mr. Scanza:

We have been engaged in the above-referenced matter as associate counsel with Ted R. Frame of the law firm of Frame & Matsumoto for Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc., and, in that capacity, herewith request a reconsideration of the Administrator's August 4, 1992 determination to deny Respondent's challenge to the Arbitrator's continued service and to reaffirm the appointment and continued service of Arbitrator John E. Peterson.

The reason for this Request for Reconsideration is that, upon our independent analysis, in view of the facts and circumstances, it is our belief that the original determination by the Administrator under the American Arbitration Association ("AAA") Commercial Rules was incorrect.[1] There have been further developments as well supporting the

[1]This firm has represented the Helm parties in an ongoing Federal District Court matter involving an insurance dispute relating to losses at the Helm facility.

Respondent's initial objection to the appointment and continued service of Mr. Peterson.

As reflected in the prior materials submitted to the Administrator, in the above-referenced arbitration the attorneys for Alfa-Laval Food and Dairy Company, A Division of Alfa-Laval, Inc. ("Alfa-Laval") are both the Wildman, Harrold, Allen & Dixon firm ("Wildman, Harrold"), as well as the prominent Fresno law firm of McCormick, Barstow, Sheppard, Wayte & Carruth ("McCormick, Barstow"). The genesis of the above-referenced arbitration is as follows:

On or about September 14, 1990, plaintiffs Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc. filed a forty million dollar lawsuit against Alfa-Laval Food and Dairy Company, Alfa-Laval Credit AB (a related company) and two Alfa-Laval employees, Thomas W. Hincz and W. Stanley Pritchard, in the Superior Court of California, County of Fresno, Case No. 4257663, seeking money damages suffered as a result of alleged breach of contract, fraud, negligent misrepresentation, and other causes of action regarding certain equipment and services furnished under several contracts by Alfa-Laval for the operation of a tomato processing plant owned and operated by plaintiffs.

In response, Alfa-Laval, by and through its counsel, McCormick, Barstow, requested the court to compel arbitration and also requested the court to stay the suit pending completion of the arbitration. The court did order the matter into arbitration and stayed the proceedings on November 29, 1990.

After the filing of the September 14, 1990 lawsuit in Superior Court, but prior to obtaining the order for stay, Alfa-Laval's Chicago attorneys, Wildman, Harrold, filed a Demand for Arbitration on October 10, 1990, pursuant to the relevant equipment and services contracts, which were the same contracts in dispute in the September 14, 1990

court action. The Helm/Britz Companies responded and counterclaimed.

Pursuant to the Fresno Superior Court's order compelling arbitration and staying the Superior Court action, the parties proceeded to arbitration before the AAA, by and through the regional office in Los Angeles which has jurisdiction over Fresno, California, where the parties agreed the arbitration would take place. As the Administrator can see, from the outset of this action, the Alfa-Laval parties were represented by two law firms, the Chicago firm of Wildman, Harrold and the Fresno firm of McCormick, Barstow. In January 1991, Mr. Peterson was jointly selected as Arbitrator by Wildman, Harrold after consultation with McCormick, Barstow, and by Mr. Frame.

For about a year prior to the commencement of the evidentiary hearing in January of 1992, the parties proceeded with substantial pre-arbitration discovery. Many of the depositions took place in the McCormick, Barstow law offices and certain discovery matters were handled directly by McCormick, Barstow.

In particular, and most importantly, John T. Savrnoch of McCormick, Barstow directly communicated with Mr. Peterson on December 2, 1991 on behalf of Alfa-Laval in regard to securing a subpoena to compel a third party to produce documents. On December 6, 1991, Mr. Peterson responded, in due course, to Mr. Savrnoch granting McCormick, Barstow's request for a subpoena and copied his response to the Wildman, Harrold firm, to Mr. Frame, to the law firm for the third party from whom the documents were compelled and to the AAA Administrator, Ron McNair. THE IMPORTANCE OF THIS COMMUNICATION IS THAT IT ESTABLISHES, BEYOND ANY CONCEIVABLE DOUBT, THAT MR. PETERSON KNEW THAT THE ALFA-LAVAL PARTIES WERE REPRESENTED BY TWO FIRMS — THE PROMI-

NENT FRESNO FIRM OF McCORMICK, BARSTOW AND THE CHICAGO FIRM OF WILDMAN, HARROLD AS EARLY AS DECEMBER 1991.

During the course of the evidentiary hearing which took place in January of 1992, Alfa-Laval, was represented by individuals from the Wildman, Harrold firm, and the McCormick, Barstow firm apparently took a backseat, their client evidently having determined that it was not necessary to have two firms present during the arbitration evidentiary hearings. Nevertheless, it is obvious that the Wildman, Harrold firm, a Chicago firm, which never sought admission "pro hac vice", was co-counseling with the local McCormick, Barstow firm throughout the arbitration proceedings.

After conclusion of the evidentiary hearing on or about May 22, 1992, Mr. Peterson served his Interim Award as to liability only, essentially finding in favor of Alfa-Laval.

It is, of course, not unusual for firms to refer matters to and from each other, and that is a matter of common knowledge. In 1985, for example, Mr. Frame represented parties in a matter in which McCormick, Barstow hired Mr. Peterson to be an expert witness. Of course, Mr. Frame could not have known and did *not* know that six years later, during *this* arbitration, McCormick, Barstow again hired Mr. Peterson as an expert in two matters in November and December of 1991.

It was not until June of 1992 that the Helm/Britz parties learned for the first time that Mr. Peterson may have had a *continuing* business relationship with McCormick, Barstow of some nature. It was for that reason that they had commenced to correspond directly with the Arbitrator to request him to disclose the nature and extent of any *continuing* business relationship.

It is remarkable that Mr. Peterson did not, on his own initiative, comply with the AAA Commercial Arbitration

Rules, Rule 19, nor with Canon II of the Code of Ethics for Arbitrators in Commercial Disputes, requiring disclosure of any prior or continuing business relationship with counsel for one of the parties. The AAA requests that every neutral arbitrator, *upon appointment,* sign a disclosure statement that reads:

> "It is most important that the parties have a complete confidence in the arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social, or of any other kind. *If any relationship arises during the course of the arbitration* or if there is any change at any time in the biographical information you have provided to the AAA, *it must also be disclosed. Any doubts should be resolved in favor of the disclosure.* If you are aware of such a relationship, please describe it below. The AAA will call the facts to the attention of the parties' counsel." (Emphasis added.)

At no time prior to July of 1992 did Mr. Peterson make the required disclosure. The July 1992 disclosures were extraordinarily significant.

As noted above, it was in January of 1991 that Mr. Peterson was appointed Arbitrator. It was in January of 1992 that Mr. Peterson conducted an evidentiary hearing that led to the May 1992 Interim Award.

However, on or after receiving McCormick, Barstow's December 2, 1991 letter, on December 6, 1991, exactly one month prior to the commencement of the evidentiary hearing, Mr. Peterson prepared a written response to John T. Savrnoch, Esq. of the McCormick, Barstow firm, acknowledging receipt of Mr. Savrnoch's December 2, 1991 letter requesting issuance of a deposition subpoena for the production of documents by a third party, and ruled on that request agreeing to issue the subpoena as requested by Alfa-Laval,

by and through its counsel, McCormick, Barstow. Attached to this request for reconsideration are copies of the McCormick, Barstow December 2, 1991 correspondence and Mr. Peterson's December 6, 1991 correspondence for your review.

In July 1992, Mr. Peterson revealed for the first time that not only were there six cases, *which at the time of the arbitration hearing* the arbitrator or his firm were representing clients referred to them by McCormick, Barstow, there were two other particularly significant matters *which began within sixty (60) days of the arbitration hearing and continued during and after it, probably to the present.* The other matters were as follows:

(1) In *Bilyeu v. Baker, Manock & Jensen,* Mr. Peterson was engaged by the McCormick, Barstow firm beginning in November 1991 and continuously thereafter as an expert witness; and

(2) In *Fansler v. Motschiedler, Michaelides & Wishon,* McCormick, Barstow contacted Mr. Peterson in December of 1991 and engaged him as an expert witness, and he continued in that capacity thereafter and gave an oral opinion, and in February 1992, a deposition testimony.

Please note that within the same month (December 1991) that Mr. Peterson responded favorably to McCormick, Barstow's discovery request on behalf of Alfa-Laval, Mr. Peterson was engaged *not once but twice as an expert witness for McCormick, Barstow,* counsel for one of the parties, Alfa-Laval! Neither of these two events could be professionally insignificant to Mr. Peterson. Direct engagement as an expert witness by the most prominent law firm in Fresno is a coveted accomplishment. Presiding over a forty million dollar arbitration is an opportunity few attorneys ever experience.

Perhaps the confluence of these two events temporarily blinded Mr. Peterson to his ethical obligations of disclosure. In any case, Mr. Peterson ceased qualifying as a neutral arbitrator when he accepted the November-December 1991 engagements from McCormick, Barstow.[2]

Mr. Peterson has declined Mr. Frame's request for a continuance of the damages hearing scheduled for February 22, 1993. Thus, we must ask for an immediate review and reconsideration by the Administrator.

For the Administrator's information, the additional evidence we would like to bring before the Administrator is simply the first page of the response brief filed by Alfa-Laval with the Court of Appeal in this matter. Having failed to secure the Administrator's assistance in this matter, Mr. Frame filed a Petition to Vacate the Interim Award, on the basis of arbitral bias which petition was opposed by McCormick, Barstow and Wildman, Harrold on behalf of Alfa-Laval.

The opposition filed by Alfa-Laval essentially argued that the Interim Award was interlocutory and that it was premature to attack the award on the basis of arbitral bias or on any other basis. The Superior Court ruled in favor of Alfa-Laval on the question of the timeliness of the Petition to Vacate, and Mr. Frame thereafter filed a Petition for Writ of Mandate with the Appellate Court. On or about January 21, 1993 the Court of Appeal, Fifth Appellate District, re-

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[2]We believe that even before accepting the experting assignments, Mr. Peterson was obligated to disclose the other business dealings with McCormick, Barstow. However, due to Mr. Peterson's direct and continuing employment by counsel for Alfa-Laval, there is no need to belabor the point that Mr. Peterson does not qualify as a neutral arbitrator and must be removed. Remarkably, Mr. Peterson gave an expert deposition in February of 1992 in the *Fansler* matter while Mr. Peterson was preparing the initial Interim Award. Please see the declaration of Richard C. Crossman attached hereto.

quested a response to the Petition for Writ of Mandate with particular concern with regard to whether the Superior Court has jurisdiction to intervene prior to the rendition of a final award.[3]

Alfa-Laval filed the requested opposition, and we enclose for your review the cover of the opposition which supports the Respondent's objection to the appointment and continued service of Mr. Peterson. The brief filed by Alfa-Laval demonstrates beyond any possible doubt that Alfa-Laval is represented in this matter by two sets of attorneys, the Chicago firm of Wildman, Harrold and the Fresno law firm of McCormick, Barstow.

There simply can be no doubt that these are the facts and have been since prior to the commencement of the arbitration proceedings. There can also be no doubt that Mr. Peterson was personally informed of these facts, and that Mr. Peterson failed to comply with Commercial Arbitration Rules of the AAA in that he failed to disclose his prior and ongoing business relationship with counsel for one of the parties.

Finally, in November of 1991, and continuously thereafter, under the Commercial Arbitration Rules and the Code of Ethics, Mr. Peterson ceased being a qualified neutral arbitrator (even assuming Mr. Peterson was qualified prior to that time).

On these bases therefore, we respectfully request that the Administrator immediately reconsider the initial objection by Respondent to the appointment and continued service of Mr. Peterson. If you deem it appropriate, we would be pleased to attend a hearing on this issue to further articulate our position on this matter.

---

[3]In addition, the Britz/Helm parties have requested a stay of the arbitration proceedings from the Court of Appeal. The Appellate Court has not yet addressed the request for stay.

Thank you for your consideration of this matter, and we look forward to hearing from you shortly. If we can provide any further or additional information, please do not hesitate to contact this office.

Very truly yours,

COTKIN & COLLINS

BY: /s/ JOAN M. DOLINSKY
Raphael Cotkin
Joan M. Dolinsky

JMD:nmk
Enclosures

cc: (w/enclosures)

Ted R. Frame, Esq.
FRAME & MATSUMOTO

Craig M. White, Esq.
WILDMAN, HARROLD, ALLEN & DIXON

Stephen R. Cornwell, Esq.
McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH

John E. Peterson, Esq.
JORY, PETERSON & SAGASER

[AMERICAN ARBITRATION ASSOCIATION LETTERHEAD]

February 18, 1993

72 T199 2101 90
Alfa-Laval Food And Dairy Co.,
A Div. Of Alfa-Laval, Inc.
-and-
Helm Concentrates, Inc., Britz, Inc., & Helm Tomatoes, Inc.

AAA Rules: Commercial

VIA FAX

Craig White Michael Dockterman
& Daniel Kaplan Attorneys
for Alfa-Laval Food & Dairy Co.
Wildman Harrold Allan & Dixon
225 West Wacker Dr #3000
Chicago, IL 60606

Ted R Frame Attorney
for Helm Concentrates etc
Frame & Matsumoto
P O Box 895
Coalinga, CA 93210

Andrew W. Vorzimer,
Raphael Cotkin and
Joan M Dolinsky Attorneys
for Helm Concentrates etc
Cotkin & Collins
201 N Figueroa St S-1100
Los Angeles, CA 90012

Dear Parties:

The Association, after carefully considering the parties' contentions, hereby reaffirms the appointment of John E. Peterson as the Arbitrator in the above captioned matter.

Additionally we received a telecopied letter dated February 18, 1993, from Attorney Vorzimer, advising that Respondents Helm Concentrates, Inc., Britz, Inc. and Helm Tomatoes, Inc. will file an action in Superior Court seeking a temporary restraining order against the American Arbitration Association in this proceeding.

We believe it is neither necessary nor proper to include the Association nor the Arbitration Panel as parties to any legal proceedings between the parties in connection with this arbitration. Section 47 of the Rules states that "Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration."

Were the AAA to become involved in judicial proceedings between the parties, it would detract from its function as an impartial administrator. Thus, the AAA does not generally appear or participate in litigation relating to an arbitration. Therefore, the Association will not answer or appear at the Court Hearing.

The Association will, however, abide by any Order issued by the Court.

Very truly yours,

/s/ ROCCO M. SCANZA

Rocco M. Scanza
Regional Vice President
RMS/ves

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755
Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
LOS ANGELES DIVISION

In the Matter of:

ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB,

Petitioners,

and

HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC.,

Respondents.

American Arbitration Association Case No. 72199 2101 90

FINAL AWARD OF ARBITRATOR

The following award is entered pursuant to the Opinion of Arbitrator made and submitted contemporaneously herewith:

1. Neither Helm Concentrates, Inc., Helm Tomatoes, Inc., nor Britz, Inc., shall have any recovery on their counterclaim as to either Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., or Alfa-Laval Credit AB.

2. Neither Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., nor Alfa-Laval Credit AB shall have any recovery as to Helm Tomatoes, Inc., on Petitioners' claim herein.

3. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., shall recover nothing by reason of its claim on the Agreement for the Supply of Sterile Pouches.

4. Alfa-Laval Credit AB shall have an award entered in its favor against Helm Concentrates, Inc., on the Lease Agreement covering three StarAsept filling machines as follows:

a. For reimbursable services: $30,600

b. For equipment rent: $260,164

Subtotal: $290,764

5. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., shall have an award in its favor against both Helm Concentrates, Inc., and Britz, Inc., on the Agreement for Sale of Equipment and Services and Britz, Inc.'s guarantee as follows:

a. Sale of equipment: ($154,716)

b. Reimbursable services: $451,377

Subtotal: $296,661

TOTAL DAMAGES AWARD: $587,425

6. Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., is awarded its attorneys' fees and costs of suit, as against Helm Concentrates, Inc., and Britz, Inc., to be made by supplemental award following receipt and analysis of supporting declaration(s) from attorneys for Alfa-Laval Food and Dairy Co.

DATED: March 31, 1993.

/s/ JOHN E. PETERSON
John E. Peterson, Arbitrator

RECEIVED
MAY 10 1993
AMERICAN ARBITRATION
ASSOCIATION
LOS ANGELES DIVISION OFFICE

JORY, PETERSON & SAGASER
555 West Shaw Avenue, Suite C-1
Post Office Box 5394
Fresno, California 93755

Telephone: (209) 225-6700

John E. Peterson, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

LOS ANGELES DIVISION

In the Matter of:

ALFA-LAVAL FOOD AND DAIRY CO., a division of ALFA-LAVAL, INC., and ALFA-LAVAL CREDIT AB,

Petitioners,

and

HELM CONCENTRATES, INC., BRITZ, INC., and HELM TOMATOES, INC.,

Respondents.

American Arbitration Association Case No. 72199 2101 90

SUPPLEMENTAL AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to paragraph 6 of the Final Award of Arbitrator signed on March 31, 1993, the Arbitrator has read and considered Petitioners' Application for Attorneys' Fees and Costs and the exhibits served and filed with it, together with Respondents' May 4, 1993 letter opposing the Application.

A. *Attorneys' Fees*

Section 7 of the Equipment Agreement signed by Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., Britz, Inc., and Helm Concentrates, Inc., reads in pertinent part "... the prevailing party in arbitration shall be entitled to reasonable attorneys' fees."

Under the authority of California Code of Civil Procedure Section 1033.5 and *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 275 Cal.Rptr. 646, the Arbitrator hereby exercises his discretion and awards attorneys' fees in favor of Alfa-Laval Food and Dairy Co., a division of Alfa-Laval, Inc., and against Helm Concentrates, Inc., and Britz, Inc., in the amount of $1,412,953.75.

In connection with this award of attorneys' fees, the Arbitrator has reviewed the detailed explanation of the basis for Petitioners' application, Exhibit A. The Arbitrator is familiar with the hourly rates charged by attorneys in the San Joaquin Valley, and finds that although the rates charged by Petitioners' attorneys in this matter are in the high end of the range of prevailing market rates, they are nevertheless reasonable under the circumstances.

Respondents accurately note that Michael Dockterman, one of Petitioners' attorneys, although present during the hearings held in this arbitration, did not participate in argument or the presentation of evidence. However, Petitioners faced complex and technical claims in excess of $40 million. The Arbitrator infers that Mr. Dockterman's clients believed his presence at trial was necessary to their case, from the fact that Mr. Dockterman attended the

damages phase of the arbitration in the face of the Arbitrator's earlier indication that there would be no award of attorneys' fees to either side. Although not determinative, this belief is entitled to some weight. The Arbitrator finds that under all of the circumstances of this case, Mr. Dockterman's presence at the arbitration was reasonably necessary to the presentation of Petitioners' case.

B. *Costs*

Respondents object to the amount claimed for "consulting services" by Messrs. Hincz, Lechowich, Long and Lowen, and about "services rendered" by Coopers & Lybrand. In addition, Respondents complain about the lack of detail in the claim for travel expenses, and the lack of substantiation in the Veronica Foods/purchase of paste, among other things.

Although the declaration submitted by Mr. Dockterman in support of Petitioners' application for attorneys' fees is technically deficient (see California Code of Civil Procedure Section 2015.5) Respondents have waived any right they might have to object the technical deficiency by failing to raise it in their opposing letter of May 3, 1993. Accordingly, the Arbitrator will consider Mr. Dockterman's declaration as a properly verified memorandum of attorneys' fees and costs. Similarly, although Respondents have not provided their objections to the content of Petitioners' application in affidavit or declaration form, the Arbitrator will consider Respondents' May 3 letter as properly objecting to Petitioners' application, both as to attorneys' fees and as to costs. See *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624, 134 Cal.Rptr. 602, 606; and *Oak Grove School District v. City Title Insurance Co.* (1963) 217 Cal.App.2d 678, 698-699, 32 Cal.Rptr. 288, 299.

Under *Oak Grove* (217 Cal.App.2d at 698-699, 32 Cal.Rptr. at 299) if the items in the Petitioners' application

appear to be proper charges, the application is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred, and the burden of showing that an item was not properly chargeable or is unreasonable is on Respondents. However, where a claim is made for a disbursement which on its face does not appear to be proper or is for a disbursement the necessity for which is doubtful, and the item is properly challenged, the burden is on Petitioners to establish the necessity for the disbursement.

For ease of reference the Arbitrator has numbered the items on Exhibit B of Petitioners' application, 1 through 25, inclusive, on the first page, and 26 through 47, inclusive, on the second page. After consideration of items of costs allowable and not allowable under CCP Section 1033.5, and consistent with the Arbitrator's discretion under *Oak Grove, supra,* and *Bussey v. Affleck, supra,* the Arbitrator disallows items 2, 9, 11, 12, 18, 19, 20, and 30, because Petitioners have not carried their burden of proof as to these items. The Arbitrator awards costs in favor of Alfa-Laval, Inc., and against Respondents Helm Concentrates, Inc. and Britz, Inc., in the amount of $696,747.45.

The Arbitrator finds that the costs and disbursements set forth in Petitioners' application allowed by this award (1) are those ordinarily billed to the client; (2) are not included in the overhead component of counsel's hourly rate; and (3) were reasonably necessary for the adequate presentation of Petitioners' case. See *Bussey, supra,* 225 Cal.App.3d at 1166, 275 Cal.Rptr. at 648; and CCP Section 1033.5. The award of these costs and disbursements is set forth separate from the award of attorneys' fees only for ease of reference.

C. *Conclusion*

In making these determinations, the Arbitrator has considered a number of factors, including, but not limited to,

the nature of this arbitration, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, and the success of Petitioners in resisting Respondents' claims and recovering damages from Respondents. The total award of attorneys' fees and costs is $2,109,701.10.

DATED: May 6, 1993.

/s/ JOHN E. PETERSON

John E. Peterson, Arbitrator